95-798

Supreme Court, U.S.
FILED
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Docket No. _____

IN THE SUPREME COURT OF
THE UNITED STATES

October 1995 term

GLENN R. WAITE,

Petitioner,

vs.

W. SCOTT CARPENTER, M.D.,

Et. Al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO

THE NEBRASKA COURT OF APPEALS

AND NEBRASKA SUPREME COURT

Respectively Submitted,
Glenn R. Waite,
Petitioner
1202 West 28th St.
Cheyenne, WY 82001
307-634-8712

89

(a) Questions Presented for Review

(1) May the Nebraska Courts refuse to determine the federal question of whether the trial court violated the rights of Glenn R. Waite, under the 14th amendment to the U.S. Constitution, by claiming that the trial court, under the law of the case doctrine, lacked jurisdiction to consider his motions when the federal question was presented for the first time on this appeal?

(2) Can the Nebraska Courts deny Glenn R. Waite, a resident of Wyoming, his constitutional rights under Article IV, section 2, clause 1, and Amendments 1 and 14 of the U.S. Constitution by holding that the trial court,under law-of-the-case doctrine, lacked jurisdiction to consider his motions to vacate a judgment of dismissal alleged to be void because a disqualified judge heard arguments at the hearing which lead to dismissal and the court failed to bring all indispensable parties into court when the Nebraska courts allow its own residents the privilege of vacating a void judgment at any time (even after decision is affirmed on appeal) and the privilege of admitting newly discovered evidence as if no appeal had been taken and the privilege of having all indispensable parties whose rights will be affected brought into court before a final decision is rendered?

(3) Did the Nebraska trial court violate the rights of Glenn R. Waite, under the 14th amendment to the U.S. Constitution, on September 3, 1991, when the court provided him with a disqualified judge and, on April 11, 1994, when the court had not disposed of a Motion for Continuance and Motion for Change of Judge and had not provided him with an opportunity to show why the judge should recuse himself?

(b) List of All Parties

A-94-444:

Appellant: Glenn R. Waite.

Appellees: W. Scott Carpenter, M.D.,
Regional West Medical Center,
Scottsbluff Internal Medicine
Group.

A-94-445:

Appellant: Glenn R. Waite.

Appellees: W. Scott Carpenter, M.D.,
Armando J. Mangana, M.D.,
William M. Packard, M.D.,
Terry Mark Himes, D.O.,
Regional West Medical Center.

A-94-498:

Appellant: Glenn R. Waite.

Appellees: W. Scott Carpenter, M.D.,
Terry Mark Himes, D.O.,
Larry O'Holleran, M.D.,
Jama Houck, R.N.,
Donna Rusen, R.N.,
Judy Bowlin, L.P.N.,
Regional West Medical Center.

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Waite v. Carpenter, 1 Neb. App. 321, 496 N.W.2d 1 (1992)

Letters of Personal Representative and Decree of Heirship, Sheridan County Nebraska Court, PR90-78 (1994)

Waite v. Carpenter, 3 Neb. App. 879, 533 N.W.2d 917 (Neb. App. 1995)

(e) Statement of the Jurisdiction of this Court.

This Court has jurisdiction under Title 28 U.S.C. sections 1257 and 1651. Pursuant to rule 13.1 of the U.S. Supreme Court Rules effective October 2, 1995, this petition is timely because the judgment or order sought to be reviewed was filed July 3, 1995 from the Nebraska Court of Appeals and this decision was subject to discretionary review by the Nebraska Supreme Court which overruled Appellant's Petition for Further Review on August 22, 1995 [appendix 25-26]. A Motion for Rehearing on the Petition for Further Review and Motion to Stay Mandate were overruled Sept. 20, 1995 [appendix 27].

(f) The constitutional provisions, treaties, statutes, ordinances and regulations involved in the case.

Article III, sections 1 and 2, of the U.S. Constitution state:

> "Section 1. Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and

Proceedings shall be proved, and the Effect thereof."

"Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;- to all Cases affecting Ambassadors, other public Ministers and Consuls;- to all Cases of admirality and maritime Jurisdiction;-to Controversies which the United States shall be a Party;- to Controversies between two or more States;-between a State and Citizens of another State;-between Citizens of different States,-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Article IV, section 2, of the U.S. Constitution states:

"Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Article VI, clause 1, of the U.S. Constitution states:

"This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Article I in addition to, and amendment of, the U.S. Constitution states:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Article XIV in addition to, and amendment of, the U.S. Constitution states:

> "**Section** 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priviliges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(g) A Concise Statement of the Case.

Background: This is an appeal from an original proceeding by petitioner to vacate a void judgment rendered against the Personal Representative of the decedent, Harriet I. Waite, on September 5, 1991 in two survival actions and one wrongful death action. The allegations of the wrongful death action [appendix 61-76] is that the decedent [who was competent and had no terminal illness] died directly from a continuous morphine infusion administered to her by employees at Regional West Medical Center knowing she had expressly refused the unwanted medical treatment. The decedent's food and water and feeding tube were

discontinued without her consent and without any medical indications. The decedent had a U.S. Constitutional right to refuse treatment which she knew would kill her. The withdrawal of food and water without her consent was unusual and cruel punishment without due process of law.

Stage when federal question raised: The motions to vacate the void judgment in the trial court did not directly raise a federal question though access to the courts and due process was argued. However, in the Nebraska Court of Appeals, Appellant raised the federal questions of access to courts and violation of due process in his brief when discussing jurisdiction of the district court and court of appeals and in his objection and brief in opposition to the Appellees' motions for summary affirmance [appendix 78-82].

Manner of raising federal questions: Appellant's brief on appeal in discussing the issue of the jurisdiction of the trial court and Court of Appeals stated:

> "In order to file motions to vacate the void judgment, plaintiff had to present clear proof that he was representing only himself and argument should not be used by the defendants to claim that plaintiff cannot present this proof because he is presenting matters that should have or could have been presented in the previous appeal. Plaintiff has a right of access to the courts protected by Art. I sec. 13 of the Nebraska Constitution and Art. 4, sec. 2, cl. 1 and amendments 1 and 14 of the U.S. Constitution."

Then, in discussing the inherent power of the court to vacate a void judgment, the appellant's brief stated:

"Though a court possesses "inherent powers", the "inherent power of the judiciary" cannot be used as a vehicle to violate Nebraska law or violate a litigant's right to access to Nebraska Courts under Article I, section 13 of the Nebraska State Constitution and United States Constitution Article 4, section 2, clause 1 and amendments 1 and 14 such as forcing a trust on persons not parties to lawsuit or as a vehicle to obtain a judgment for a judge who has a pecuniary interest in the case."

In response to the motion for summary affirmance filed by Appellees W. Scott Carpenter, M.D., et. al., the Appellant filed his objection [appendix 78-82] which stated:

"Furthermore, a violation by the trial court of Appellant's rights under the fourteenth amendment to the U.S. Constitution is a substantial issue requiring argument in this court."

And in response to the appellees' motion for summary affirmance and dismissal, Appellant's memorandum brief stated:

"In cooperation with the Appellees, the trial court as a judicial branch of the State of Nebraska has twice violated my rights under the fourteenth amendment to the United States Constitution...."

Then, in the appellant's reply brief in rebuttal argument to the appellees' assertion that the "taint" by Judge Hippe and Judge Kortum can be cured by the Court of Appeals without granting a new trial on the unauthorized practice of law issue, appellant referred to his Memorandum brief in opposition to the Appellees' motions for summary affirmance and dismissal and stated:

"Appellee is legally incorrect to state that the "taint" by Judge Hippe and Judge Kortum can be cured by the Court of Appeals without granting a new trial; Ward v. Monroeville, 409 U.S. 57, 34 L Ed 2d 267, 93 S Ct. 80 (1972)."

Way in which the Court passed on these federal questions: On September 26, 1994, the Court of Appeals overruled the Appellees' motion for summary affirmance or dismissal [appendix 28-31]. However, on July 3, 1995, the Court of Appeals ruled adversely to Appellant by affirming the trial court's decision and stated that, under the law of the case doctrine, the trial court lacked jurisdiction to consider plaintiff's motions to vacate the void judgment. On August 22, 1995, the Nebraska Supreme Court overruled Appellant's Petition for Further Review [appendix 25-26].

(h) Direct and concise argument.

SUMMARY: The decision of the Nebraska Court of Appeals on July 3, 1995 states that the trial court has no jurisdiction to hear my motions to vacate a former judgment allegedly decided by a disqualified judge in violation of the 14th amendment to the U.S. Constitution. The Court of Appeals decision does not rest on adequate and independent state grounds and this Court has jurisdiction to hear the federal questions.

ARGUMENT: Petitioner represents only his own personal state and federal rights. I am a licensed Family Physician and I understand that this Court does not address the merits of the lawsuits which involve allegations of involuntary euthanasia. However, as a physician, I believe that I have an obligation to society in general and must try to prevent this tragic crime from happening again. Preamble III of the "Principles of Medical Ethics" of the American Medical Association states:

> "A physician shall respect the law and also recognize a responsibility to seek changes in those requirements which are contrary to the best interests of the patient."

It is contrary to the best interests of any patient for any physician to sanction or perform the crime of involuntary euthanasia.

In Cruzan v. Director, Missouri Dept. of Health, 497 U S 261, 111 LEd2d 224, 110 S Ct. 2841 (1990), this Court stated that a competent adult has a constitutionally protected liberty interest in refusing unwanted medical treatment. You further stated at 110 S Ct 2852 that as a general matter, the States - indeed, all civilized nations - demonstrate their commitment to life by treating homocide as a serious crime. Involuntary euthanasia is a crime.

My mother had a U.S. Constitutional right to refuse unwanted medical treatment and especially medical treatment which she knew would kill her. That right was denied her and she is dead. I believe that I should be allowed assess to the Courts, either by retaining an attorney or by representing myself, in order to assert my own rights which are protected by the U.S. Constitution. I believe that the Nebraska Courts clearly violated my federal rights.

In Williams v. Georgia, 349 U S 375 at 385, 99 L Ed 1161, 75 S Ct 814 (1954), this Court apparently agreed with the Georgia Supreme Court which stated that parties are not required to make searching investigation out of court to determine whether the jurors who are summoned are disqualified in their cases and that not only is such a duty not placed by the law upon the parties and their counsel, but the contrary practice is to be encouraged for obvious reasons.

In this case, I had no knowledge of Judge Hippe's wife's employment by the hospital defendant and possible involvement

in my mother care when Judge Hippe heard arguments on September 3, 1991. According to Williams, supra, I do not believe that I had any legal obligation to go outside the court in September 1991 to investigate Judge Hippe's wife who was employed by Regional West Medical Center [appendix 60, 82-87].
Background: In Waite v. Carpenter I, the summary judgment of dismissal was rendered against the Personal Representative, not against Glenn Waite, individually. The judgment merely stating that there was no genuine issue as to any material fact and the defendants were entitled to judgment as a matter of law. It did not state that Glenn Waite was engaged in the unauthorized practice of law or that he was not the sole heir of Harriet Waite. The personal representative's attorney prosecuted an appeal and the Nebraska Court of Appeals affirmed the lower court's decision and concluded that Glenn Waite was not the sole heir of Harriet Waite and ruled that the personal representative could not retain or continue to retain an attorney. In Waite v. Carpenter II, Sole beneficiary Waite filed motions to vacate the judgment of dismissal on the grounds that the judgment was void because a disqualified judge presided at the September 3, 1991 hearing and all indispensable parties were not brought into court. The trial court overruled the motions and the Court of Appeals affirmed the lower court's decision and held that the trial court, under the law-of-the-case, lacked jurisdiction to hear Waite's motions.

(1) Was there an adequate and independent state ground which would bar further review by the U.S. Supreme Court?
Standards: The adequacy of the state-law ground to support a judgment precluding litigation of the federal claim is a federal question, which the U.S. Supreme Court

reviews de novo; Howlett v. Rose, 496 U.S. 356, 110 L Ed 2d 332 at 340, 110 S Ct 2430 (1990). If the judgment sought to be reviewed by the Supreme Court is supported by an adequate and independent state substantive ground, the Supreme Court has no jurisdiction; Henry v. Mississippi, 379 U.S. 443, 13 L Ed2d 408, 85 S Ct 564 (1965). However, if the nonfederal ground is so interwoven with the other as not to be an independent matter or is not of sufficient breath to sustain the judgment without any decision of the other or is a mere device to prevent a review of the decision upon the federal question, the Supreme Court's jurisdiction is plain; Chicago, B. & Q R. Co. v. Illinois, 200 U.S. 561, 50 L Ed 596, 26 S Ct 341 (1906). The Supreme Court looks at prior decisions by the state courts to see if the state court is making an interpretation of state law with a specific intent to deprive a litigant of a federal right; Williams v. Georgia, 349 U.S. 375, 99 L Ed 1161, 75 S Ct 814 (1954). Where denial of a motion on state grounds was an exercise of discretion and not a result of lack of power, the U.S. Supreme Court has jurisdiction to consider the federal question; Williams v. Georgia, supra.

Application to this case: In Waite v. Carpenter, 3 Neb. App. 879, 533 N.W.2d 917 (1995), the Court held that, under the law-of-the-case doctrine, trial court lacked jurisdiction to consider plaintiff's motion. However, this Supreme Court has long held that the phrase "law of the case" as applied to the effect of a decision of an appellate court in an earlier appeal in the same case, merely expresses, in the absence of statute, the practice of courts generally to refuse to reopen what has been decided, and not a limit to their power, and is only a discretionary rule of practice; Messinger v.

Anderson, 225 U S 436, 32 S Ct 739, 56 L Ed1152 (1912). In Southern Ry. Co. v Clift, 260 U S 316, 317, 67 L Ed 283, 43 S Ct 126 (1922), this Supreme Court stated that a decision of a state court disposing of a federal question by following its decision on former appeal as the law of the case cannot be regarded as resting on the independent, non-federal ground of res judicata. Several states have held that the rule is merely a discretionary rule of practice and does not limit the court's jurisdiction; Pellon v. Connecticut General Life Ins. Co.,107 Vt. 129, 178 A 902 (1935); Webb v. Saunders, 201 P.2d 816 (Ca 1949); Hayes v. City of Wilmington, 243 N.C. 525, 91 S.E.2d 673 (1956); and Egbert v. Egbert, 235 Ind.405, 132 N.E.2d 910 (1956). Federal Courts have held that the rule is a matter of sound judicial practice and prior decision should be adhered to except for three exceptions: (1) evidence on a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision of law applicable to the issues, or (3) the decision was clearly erroneous and would work a manifest injustice; Smith International, Inc. v. Hughes Tool Co., 759 F.2d 1572 (Fed.Cir 1985); North Mississippi Communications, Inc. v. Jones, 951 F.2d 652 (5th Cir.1992). Where the state grounds of refusal to hear a motion are a discretionary rule of practice and not jurisdiction, the Supreme Court has jursidiction to hear the federal question;Williams v. Georgia, supra. In these cases [Waite v. Carpenter I & II], evidence on subsequent trial (hearing) was substantially different and would change the result of former trial (summary judgment hearing); controlling authority (probate court) has since made a contrary decision of law (Glenn R. Waite is the sole distributee) applicable to the issue; and the decision

was clearly erroneous and does work a manifest injustice. In the first appeal, the only party plaintiff was the personal representative in his official capacity [appendix 32-45], Glenn Waite, individually, was not made a party. In this appeal, Glenn Waite, individually, is a party. Law of the case only binds those parties who participated in former appeal; United States v. Fallbrook Public Utility District, 165 F. Supp. 806 (1958).

The "law-of-the-case doctrine" also applies to a case that has become final and was not appealed to a higher court; Long v. Carolina Baking Co., 193 S.C. 225, 8 S.E.2d 326 (1939). If the new rule of law in Nebraska [law-of-the-case doctrine precludes a court from exercising jurisdiction of a motion which alleges a violation of federal law] is that after a case has became final the courts have no jurisdiction to hear violations of the U.S. Constitution, then the U.S. Constitution means nothing and there is no need for federal or state courts to enforce the U.S. Constitution.

Did the trial court have any jurisdiction to hear Waite's motions to vacate the void judgment: Under Nebraska law, every court has the inherent power to vacate a void judgment at any time on a motion to the court which rendered it; Ehlers v. Grove, 147 Neb. 704, 24 N.W.2d 866 (1946). At any time means even after the case has been affirmed on appeal where the appeals court did not address the issue of the validity of the judgment; Johnson v. Parrotte, 46 Neb. 51, 64 N.W. 363 (1895). Other jurisdictions have held the same; First State Bank & Trust Co. v. Overshiner, 198 S.W. 979 (1917) and Nash v. Hanover Fire Ins. Co., 79 S.W. 2d 182 (1935). Furthermore, Nebraska law authorizes the District Court to hear new evidence even after a judgment has been

affirmed on appeal; Finnern v. Bruner, 170 Neb. 170, 101 N.W.2d 905 (1960). Any state procedural device which would deprive a litigant of submitting evidence to prove the constitutional deprivation and prevent him from making a record in the court below is itself contrary to the "due process" clause of the 14th amendment; Reece v. Georgia, 350 U.S. 85, 100 L Ed 77 at 79, 76 S Ct 167 (1955). Waite had new evidence to present to the district court, but the district court did not allow him to admit the evidence [reason for motion for new trial]. It is obvious that the Nebraska Courts in fact had jurisdiction to hear my motions. In Ehlers v. Grove, supra, Harvey Grove, a resident of Nebraska, was allowed to declare as void a judgment rendered without fact of service. In Johnson v. Parrotte, supra, Johnson, a Nebraska resident, was allowed a suit in equity to declare void certain conveyences. It is evident that Nebraska Courts allow its own residents to vacate void judgments. Under federal law, the Nebraska Courts have no discretion to refuse to entertain jurisdiction of a cause of action brought by a nonresident because of such nonresidence and cannot deny to a nonresident the same privileges it grants to its own citizens: Herrmann v. Franklin Ice Cream Co.,114 Neb. 468, 208 N.W.2d141 (1926).

If Waite's federal rights were recognized and enforced would it require a different judgment? The U.S. Supreme Court has held that if despite the fact that the State court disposed of a case on state grounds, a decision on the federal issue would change the outcome of the case, the state ground is not adequate and the Supreme Court has jurisdiction to hear the case; Chicago, B. & Q R. Co. v. Illinois, 200 U.S. 561, 50 L Ed 596, 26 S Ct 341 (1906). Waite alleges that the state court took his property (choses in

action) without due process of law in violation of the 14th amendment to the U.S. Constitution because a judge whose wife works for the defendant heard his cases on September 3, 1991 and as a result, the judgment is void. Due process clause is concerned not only with actual bias of judges and jurors, but also with appearance of justice; Exxon Corp. v. Heinze, 32 F.3d 1399 (9th Cir.1994). Access to the courts means that he must be given the opportunity to show evidence that his federal rights were violated and if sufficient evidence is shown, to have the former judgment declared null and void; Reece v. Georgia, 350 U.S. 85, 100 L Ed 77, 76 S Ct 167 (1955). Certainly, the results would have been different had the Nebraska Court of Appeals allowed Waite his federal rights. In Waite v. Carpenter, 3 Neb. App. 879, 533 N.W.2d 917 (1995), the Court was confronted for the first time with the issue of whether or not the judgment dated September 5, 1991 was a valid judgment and the issue involved a federal question. The U.S. Supreme Court may review the decision of the highest court of a State, which affirms or denies the validity of the judgment of an inferior court over which it has authority if such decision involves a federal question; Williams v. Bruffy, 102 U.S. 135 (12 Otto 248) (1880). A question raised in the supreme court of a state, and there decided, not on the ground that it was not raised in the lower court, but on its merits, is not raised too late for the purpose of a writ of error from the Supreme Court of the United States; Sully v. American National Bank, 178 U.S. 1072 (1900).

CONCLUSION

Waite has shown that he presented a federal question to the Nebraska Court of Appeals in his objection to the appellees'

motions for summary affirmance and they decided the question in his favor at that time but later reversed their decision by affirming the lower court's decision. Waite also presented the federal question of access to the courts and whether the state court can deny him access based on his non-resident status. The Nebraska Court of Appeals chose to evade the question by holding that the trial court, under law of the case doctrine, lacked jurisdiction to consider his motions. The "law-of-the-case doctrine" does not operate against persons who were not parties or parties in the same capacity in the former appeal and is only a rule of discretion and does not provide an adequate and independent basis for judgment precluding review by the U.S. Supreme Court. The validity of the September 5, 1991 judgment which the "motions to vacate judgment" are directed toward involve a federal question of whether the trial court violated the constitutional rights of Glenn R. Waite and the issues raised in the Nebraska Court of Appeals requires the resolving a federal question of which this Court has jurisdiction to hear.

WHEREFORE, Petitioner earnestly prays that this Court will grant his petition for writ of certiorari.

Glenn R. Waite

Glenn R. Waite
Petitioner
1202 West 28th St.
Cheyenne, WY 82001
307-634-8712

Affidavit of Service

State of Wyoming)
) ss.
County of Laramie)

I, Glenn R. Waite, the undersigned, do hereby cerify that I caused three copies of the foregoing **Petition for Writ of Certiorari** to be served upon James A. Snowden, attorney for respondent Regional West Medical Center and hospital employees Jama Houck, Donna Rusen, and Judy Bowlin, 1000 NBC Center, Lincoln, NE 68508; and served upon Mark E. Novotny, attorney for respondents Carpenter, Scottsbluff Internal Medicine Group, Mangana, Packard, Himes and O'Holleran, 10306 Regency Parkway Dr., Omaha, NE 68114; by first class U.S, Mail, postage prepaid, on this the 14th day of November 1995. I declare under penalty of perjury that the foregoing is true and correct.

Glenn R. Waite
Glenn R. Waite

Subscribed and sworn to before me this the 14 day of November 1995.

Mardy Rapp
Notary Public

MARDY RAPP - NOTARY PUBLIC
COUNTY OF LARAMIE
STATE OF WYOMING
My Commission Expires December 6, 1998

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OPINION OF THE NEBRASKA COURT OF APPEALS
(Designated for Permanent Publication)

Case Title

Glenn R. Waite, Personal Representative of the Estate of Harriet I. Waite, deceased, Appellant,

vs.

W. Scott Carpenter, M.D., et. al., Appellees.

Case Caption

Waite v. Carpenter

Filed July 3, 1995.
Nos. A-94-444, A-94-445, A-94-498.

Appeal from the District Court for Scotts Bluff County: Alfred J. Kortum, Judge. Affirmed.

Glenn R. Waite, pro se.

James A. Snowden, of Knudsen, Berkheimer, Richardson & Endacott, for appellee, Regional West Medical Center.

Mark E. Novotny, of Kennedy, Holland, DeLacy & Svoboda, for appellees Carpenter, et al.

WAITE V. CARPENTER

Nos. A-94-444, A-94-445, A-94-498 - filed July 3, 1995.

1. Jurisdiction: Words and Phrases. Jurisdiction is a court's power or authority to hear a case.

2. Appeal and Error. Under the law-of-the-case doctrine, the holdings of the appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purpose of that litigation, all matters ruled upon, either expressly or by necessary implication.

3. Courts. It is the duty of the courts to prevent abuse of process and frivolous proceedings in the administration of justice.

Sievers, Chief Judge, and Irwin and Mues, Judges.

SIEVERS, Chief Judge.

These three cases from the district court for Scotts Bluff County involve three "medical malpractice" cases alleging the wrongful death of Glenn R. Waite's mother. these cases were originally before this court approximately 3 years ago. In Waite v. Carpenter, 1 Neb. App. 321, 496 N.W.2d 1, (1992), this court affirmed the district court's dismissal of the lawsuits. We affirmed because we agreed with the district court that the pro se personal representative was engaged in the unauthorized practice of law and that dismissal was the appropriate remedy and sanction. Waite's petition for further view of our decision was rejected by the Supreme Court.

The present appeals involve the attempt of Waite, the appellant in the earlier cases to "revive" these suits by claiming that he is the sole heir of the decedent, Harriet I. Waite. In our previous opinion, we expressly concluded that he was not the sole heir. Our mandate affirming the dismissal of the original cases was filed in the district court on February 11, 1993. In each of the three district court cases, Waite filed pleadings as follows: a "Motion to Vacate Judgment of Dismissal" on November 17, 1993; an "Amended Motion to Vacate Judgment of Dismissal" on December 7, 1993; and a second "Amended Motion to Vacate Judgment of Dismissal" on January 19, 1994. In these motions, Waite alleged, inter alia, that the district court and the Court of Appeals lacked jurisdiction to determine the

question of his alleged unauthorized practice of law and that the district court was biased at the time of the dismissal of the original cases. After a hearing was held on these motions on February 1, 1994, the district court took these motions under advisement. On March 1, 1994, the district court recorded a journal entry which overruled all of Waite's motions in all of the cases finding that "all matters raised by the various motions of the plaintiff herein could have or should have been raised in the appeal taken to the NEBRASKA COURT OF APPEALS and in which final judgment was entered."

Thereafter, Waite filed a motion for new trial, which was subsequently overruled by the district court. Little purpose would be served by detailing Waite's allegations which purport to show that he is the sole heir of his deceased mother and, thus, can now bring the lawsuits. Waite apparently believes he can "fix" the defects previously found by this court and thereby make our judgment something other than final.

[1] As a matter of procedure, the issue is whether the district court had any power, jurisdiction, to consider Waite's motions to vacate the judgments of dismissal and reopen these proceedings after this court has affirmed the judgment of dismissal and issued its mandate to the district court. See Welch v. Welch, 246 Neb. 435, 519 N.W.2d 262 (1994) (Jurisdiction is a court's power or authority to hear a case).

[2] Under the law-of-the-case doctrine, the holdings of the appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holding conclusively settle, for purposes of that litigation, all matter ruled upon, either expressly or by necessary implication. Wicker v. Vogel, 246 Neb. 601, 521 N.W.2d2d 907 (1994). Our

previous decision conclusively settled the matter of whether these lawsuits were to be dismissed - we plainly held that they were dismissed. When the Supreme Court denied further review, our decision became final and binding on the district court. The district court therefore lacks the power to allow the reopening, revival, or relitigation of these cases. The district court correctly characterized our decision as final and had no choice but to deny the motions. Any other conclusion would mean chaos in our judicial system. If the parties and the district court were not bound by our decision, then finality of judgment would become an empty doctrine, and litigation would have no end. Although Waite believes otherwise, these cases were finally dismissed long ago.

[3] Perhaps this is an appropriate time to remind Waite that it is the duty of the courts to prevent abuse of process and frivolous proceedings in the administration of justice. See Sargent Feed & Grain v. Anderson, 216 Neb. 421,344 N.W.2d 59 (1984).

AFFIRMED.

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
402-471-3731

August 22, 1995

Glenn R. Waite, Personal Representative
1202 West 28th Street
Cheyenne, WY 82001

IN CASE OF: A-91-0444, Waite v. Carpenter
Pet. of applt. for Further Review & Brf **filed** 07/26/95 **has been reviewed by the court and the following order entered:** Petition for further review overruled.

Respectively,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
402-471-3731

August 22, 1995
Glenn R. Waite, Personal Representative
1202 West 28th Street
Cheyenne, WY 82001
IN CASE OF: A-91-0445, Waite v. Carpenter
Pet. of applt. for Further Review & Brf **filed** 07/26/95 **has been reviewed by the court and the following order entered:** Petition for further review overruled.

Respectively,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
402-471-3731

August 22, 1995
Glenn R. Waite, Personal Representative
1202 West 28th Street
Cheyenne, WY 82001
IN CASE OF: A-91-0498, Waite v. Carpenter
Pet. of applt. for Further Review & Brf **filed** 07/26/95 **has been reviewed by the court and the following order entered:** Petition for further review overruled.

Respectively,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

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August 22, 1995
Glenn R. Waite, Personal Representative
1202 West 28th Street
Cheyenne, WY 82001
IN CASE OF: A-91-0444, Waite v. Carpenter
Appt Mot Rehear Pet Fur Rev/Stay mandat
filed 09/01/95 **has been reviewed by the court and the following order entered:** Motion of appellant for rehearing on petition for further review and to stay mandate, overruled.

Respectively,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

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Appt Mot Rehear Pet Fur Rev/Stay mandat filed 09/01/95 has been reviewed by the court the following order entered: Motion of appellant for rehearing on petition for further review and to stay mandate, overruled.

Respectively,

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402-471-3731

August 22, 1995

Glenn R. Waite, Personal Representative
1202 West 28th Street
Cheyenne, WY 82001
IN CASE OF: A-91-0444, Waite v. Carpenter
Mot. of Appellee for Summary Dism or S/A **filed** 07/21/94 **has been reviewed by the court and the following order entered:** Motion of appellee for summary affirmance or dismissal overruled.

Respectively,

CLERK OF THE SUPREME COURT AND COURT OF APPEALS

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
402-471-3731

August 22, 1995
Glenn R. Waite, Personal Representative
1202 West 28th Street
Cheyenne, WY 82001
IN CASE OF: A-91-0445, Waite v. Carpenter
Mot. of Appellee for Summary Dism or S/A **filed** 07/21/94 **has been reviewed by the court and the following order entered:** Motion of appellee for summary affirmance or dismissal overruled.

Respectively,

CLERK OF THE SUPREME COURT AND COURT OF APPEALS

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509

402-471-3731

August 22, 1995
Glenn R. Waite, Personal Representative
1202 West 28th Street
Cheyenne, WY 82001
IN CASE OF: A-91-0498, Waite v. Carpenter
Mot. of Appellee for Summary Dism or S/A **filed** 07/21/94 **has been reviewed by the court and the following order entered:** Motion of appellee for summary affirmance or dismissal overruled.

Respectively,

CLERK OF THE SUPREME COURT AND COURT OF APPEALS

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
402-471-3731

August 22, 1995
Glenn R. Waite, Personal Representative
1202 West 28th Street
Cheyenne, WY 82001
IN CASE OF: A-91-0444, Waite v. Carpenter
Mot. of Appellee for Summary Dism or S/A **filed** 08/10/94 **has been reviewed by the court and the following order entered:** Motion of appellee for summary affirmance or dismissal overruled.

Respectively,

CLERK OF THE SUPREME COURT AND COURT OF APPEALS

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910

2413 State Capitol Building
Lincoln, Nebraska 68509
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August 22, 1995

Glenn R. Waite, Personal Representative
1202 West 28th Street
Cheyenne, WY 82001

IN CASE OF: A-91-0445, Waite v. Carpenter
Mot. of Appellee for Summary Dism or S/A **filed** 08/10/94 **has been reviewed by the court and the following order entered:** Motion of appellee for summary affirmance or dismissal overruled.

Respectively,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

NEBRASKA SUPREME COURT
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1202 West 28th Street
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IN CASE OF: A-91-0498, Waite v. Carpenter
Mot. of Appellee for Summary Dism or S/A **filed** 08/10/94 **has been reviewed by the court and the following order entered:** Motion of appellee for summary affirmance or dismissal overruled.

Respectively,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

OPINION OF THE NEBRASKA COURT OF APPEALS

Case Title

Glenn R. Waite, Personal Representative of the Estate of Harriet I. Waite, deceased, Appellant,

vs.

W. Scott Carpenter, M.D., et. al., Appellees.

Case Caption

Waite v. Carpenter

Filed October 27, 1992.
Nos. A-91-923, A-94-924, A-94-925.

Appeal from the District Court for Scotts Bluff County: Alfred J. Kortum, Judge. Affirmed.

Jim L. Brown, of Dawson & Brown, P.C., for appellant.

William M. Lamson, Jr., and Mark E. Novotny, of Kennedy, Holland, DeLacy & Svoboda, for appellees Carpenter, et al.

James A. Snowden and Paula J. Metcalf, of Knudsen, Berkheimer, Richardson & Endacott, for appellee, Regional West Medical Center.

WAITE V. CARPENTER
NOS. A-91-923, A-91-924, A-91-925 - filed October 27, 1992.

1. Attorney and Client. An individual may represent himself or herself and participate in trial and legal proceedings on his or her own behalf. However, one who is not an attorney may not represent others in legal proceedings, nor may such a person practice law for others.

2. ___. The rule against nonattorneys appearing in a representative capacity cannot be avoided by subterfuge.

3. Summary Judgment. Proof. Once a movant for summary judgment has established facts entitling him or her to summary judgment, the nonmovant has the burden of presenting evidence to show an issue of material fact which prevents a judgment as a matter of law.

Sievers, Chief Judge, and Connolly and Miller-Lerman, Judges.

SIEVERS, Chief Judge.

An allegation of the unauthorized practice of law resulted in an evidentiary hearing and in the district court for Scotts Bluff County's dismissal of these three cases, which we have combined for our review and opinion.

THE PARTIES AND THE PLEADINGS

These three lawsuits were filed by Glenn R. Waite, personal representative of the estate of Harriet I. Waite, deceased, and alleged acts of negligence against Harriet Waite. Waite was appointed personal representative of Harriet Waite's estate on January 2, 1991, by the county court for Sheridan County, Nebraska. Thereafter, a number of lawsuits were filed, including these three on April 8, 1991. Styled as "Complaint[s]," these suits named 10 defendants, which included a hospital, a medical group, 5 doctors, 2 registered nurses, and 1 licensed practice nurse.

The first "Complaint" filed was a negligence claim for failure to render appropriate professional services in the diagnosis and treatment of polymyositis from November 25, 1986, to April 17, 1989 (case No. A-91-923); the second negligence "Complaint" alleged the failure to render professional services in the diagnosis and treatment of a neurological injury, central pontine myelinolysis with aspiration pneumonia, from April 2 to April 17, 1989 (case No. A-91-924); and the third "Complaint" alleged the failure to protect

the "subject from harm" and to supervise the "quality of care" during the period of April 14 to April 17, 1989 (case No. A-91-925).

In two of these three lawsuits, a series of five "Complaint[s] for damages were filed. In the third lawsuit, four "Complaint[s] were filed. The final "Complaint" in each case was filed in late June to mid-July 1991. In the interest of limiting this opinion to that which is germane, we dispense with the particulars of the "Complaint[s]". It is sufficient to state that the actions asserted negligence in numerous respects on the part of the named health care providers, which negligence ceased on April 17, 1989. Although it is clear from the pleadings that Harriet Waite is deceased, her date of death is not specifically alleged, nor is her relationship with Waite set forth, except that he is the personal representative of her estate. However, each of the first three "Complaints[s]" states that the relief sought is to recover damages for the "next of kin."

The defendants, through their attorneys, filed a variety of pleadings, including demurrer, motion for nonresident cost bond, motion to make more definite and certain, motion to strike or in the alternative to make more definite and certain, motion for summary judgment, and motion to strike pleadings and to dismiss. it is clear that some, if not all, of the amended "Complaint[s]" were filed as a result of the defendants' motion practice.

EVIDENCE AND TRIAL COURT RULING

On September 3, 1991, the district court held a hearing on the motions for summary judgment and the motion to strike pleadings and to dismiss filed on the ground that Waite was engaged in the unauthorized practice of law, thereby making the

pleadings he filed a nullity. Waite appeared at that hearing with counsel from Cheyenne, Wyoming. Waite's counsel was a member of the Nebraska bar, but appeared solely for the purpose of the hearing rather than entering a general appearance as counsel in the cases. The evidence at that hearing included an affidavit from the executive director of the Nebraska State Bar Association stating that Waite is not an attorney licensed and admitted to practice in the State of Nebraska. A second affidavit was recieved from one of the defendants' attorneys, asserting that Waite had filed the pleadings and that they "were ostensibly drafted by Glenn R. Waite." The pleadings referred to in the defendants' affidavits included interrogatories and objections to interrogatories, as well as the "Complaint[s]". Waite filed his own affidavit, asserting that he was appointed as personal representaitve of the estate of Harriet Waite and that he was the plaintiff in the cases before the district court for Scotts Bluff County.

After considering the affidavits and testimony, along with the extensive pleadings, the district court found that the defendants were entitled to judgment as a matter of law, citing Back Acres Pure Trust v. Fahnlander, 233 Neb. 28, 443 N.W.2d 604 (1989). the district court further stated that there was no genuine issue as to any material fact and that "[s]ummary judgment of dismissal is entered for the defendants and against the plaintiff." Waite perfected his appeal to this court from the dismissal of three lawsuits.

ASSIGNMENTS OF ERROR

Waite does not assert any procedural or evidentiary assignments of error. His sole assignment of error is that the district court erred in granting sumamry judgment and in dismissing the actions filed by Waite.

DISCUSSION

It is uncontroverted that Waite is not an attorney, and therefore, the result in this case turns on whether he, as a nonattorney, was engaged in the unauthorized practice of law. The controlling statute is Neb. Rev. Stat. 7-101 (Reissue 1989):

> Except as provided in section 7-101.01 [relating to certified law students], no person shall practice as an attorney or counselor at law, or commence, conduct or defend any action or proceeding to which he is not a party, either by using or subscribing his own name, or the name of any other person, or by drawing pleadings or other papers to be signed and filed by a party, in any court of record of this state, unless he has been previously admitted to the bar by order of the Supreme Court of this state. No such paper shall be received or filed in any action or proceeding unless the same bears the endorsement of some admitted attorney, or is drawn, signed, and presented by a party to the action or proceeding. It is hereby made the duty of the judges of such courts to enforce this prohibition. Any person who shall violate any of the provisions of this section shall be guilty of a Class III misdemeanor, but this section shall not apply to person admitted to the bar under preexisting laws.

There is no doubt that an individual may represent himself or herself and participate in trial and legal proceedings on his or her own behalf. See State v. Warford, 223 Neb. 368, 389 N.W.2d 575 (1986). However, it is equally clear that one who is not an attorney may not represent others in legal proceedings, nor may such a person practice law for others. The Nebraska Supreme Court in Back Acres Pure

Trust v. Fahnlander, 233 Neb. 28, 443 N.W.2d 604 (1989), cited with approval the decision of the Supreme Court of Hawaii, In re Ellis, 53 Haw. 23, 487 P.2d 286 (1971), which held that a duly appointed trustee may not present pro se arguments in the courts of Hawaii because in this capacity, the trustee would be representing interests of others and would therefore be engaged in the unauthorized practice of law.

In the case at hand, Waite, as the personal representative, argues that he is representing himself as a party and therefore is not engaged in the practice of law. However, this is simply a misapprehension of the role of a personal representative. Under Nebraska law, a personal representative "is a fiduciary who shall observe the standards of care applicable to trustees...." Neb. Rev. Stat. 30-2464 (a) (Reissue 1989). In the various "Complaint[s]" facts are alleged which assert predeath injuries by the defendants, or at least some of them, to the decedent. Section 30-2464 (c) gives the personal representative authority to bring suit on any cause of action which survives the decedent's death. In addition, any action for wrongful death "shall be brought by and in the name of the person's personal representative for the exclusive benefit of the widow or widower and next of kin." Neb. Rev. Stat 30-810 (Cumm. Supp. 1992). Finally, the wrongful death statutes create a cause of action unknown at common law and one to be brought only by the personal representative. See Rhein v. Caterpillar Tractor Co., 210 Neb. 3211, 314 N.W.2d 19 (1982).

An accurate characterization of these lawsuits is that they are wrongful death actions for medical negligence brought by a personal representative with the purpose, as stated in the first "Complaint" in each

case, to recover damages for "the next of kin."

With the foregoing factual predicate based solely upon the allegations of Waite's various pleadings, we conclude that he is acting in a representative capacity in the courts of this state, contrary to the law of this state as expressed in 7-101 and Back Acres Pure Trust v. Fahnlander, supra.

Waite attempts to overcome this obvious conclusion by assering that since the defendants did not prove at the motion for sumamry judgment hearing that he was nto the sole heir, he still may represent himself in bringing this action. Although we believe our conclusion that he is a nonattorney personal representative acting in a representative capacity is dispositive of this case, we address Waite's "sole heir argument."

As we understand Waite's propostion, a sole heir who is appointed as personal representative may bring a wrongful death action without being an attorney and still not run afoul of the statutes prohibiting the unauthorized practice of law. Part and parcel of Waite's argument is the claim that the burden of proof rests upon the defendants to show that Waite was not Harriet Waite's sole heir. Waite did not offer an affidavit or other proof at the hearing on the summary judgment asserting that he was the sole heir. Nontheless, we decline to adopt a rule of law built upon a factual subterfuge which Waite would perpetrate on this court, particularly when he obviously knows about Harriet Waite's family. The rule against nonattorneys appearing in a representative capacity cannot be avoided by subterfuge. See Niklaus v. Abel Construction Co., 164 842, 83 N.W.2d 904 (1957).

Our inhospitable reception of Waite's argument is premised upon two grounds: (1)

the law in this jurisdiction regarding the burden of proof in summary judgment proceedings and (2) various allegations in the "Complaint[s] show that Waite is not the sole heir.

Addressing the factual allegations first, in cases Nos. A-91-923 and A-91-924, there are allegations of "extra financial burdeons [sic] on spouse." In case No. A-91-925, there is an allegation that one of the defendant doctors recorded false information on the medical record "inreference to a family conference held on April 16, 1989,", and further, that the decedent's "daughter requested resuscitation but none was done." Finally, in case No. A-91-923, Waite sets forth a quote from one of the defendant doctors: "I talked with her husband and they are going to begin remodeling the bathroom ..." thus, from Waite's pleadings, there are allegations of a family, a daughter, and a spouse. This is the factual basis of our cold reception to Waite's sole heir argument.

Those factual allegations of Waite's various "Complaint[s]" are considered in conjunction with the often-cited rule that once the movant for summary judgment has established facts entitling him or her to summary judgment, the movant has the burden of presenting evidence to show an issue of material fact which prevents a judgment as a matter of law. See Barelmann v. Fox, 239 NEb. 771, 478 N.W.2d 548 (1992). Even if we were to assume some validity in Waite's sole heir argument, it is abundantly clear that the burden was upon him to establish that he was the sole heir given his own allegations of the existence of "family," "spouse," "husband," and "daughter." He failed to do this, and therefore, no issue of material fact was present. Accordingly, we conclude that not only was Waite acting in a representative capacity as personal

Representative for the estate of Harriet Waite, but also that he was not the sole heir of Harriet Waite.

We now turn to the question of whether Waite was engaged in the practice of law. In the 3 cases under consideration here, there are a total of 14 "Complaint[s]" signed by Waite. As wrongful death actions, they are of the type which may only be maintained by a personal representative, and as stated, a nonlawyer may represent himself or herself, but may not act as the legal representative fro anyone else. This rule includes a nonattorney personal representative for an estate. Obviously, the personal representative who brings a wrongful death suit is bringing it for the benefit of the other heris, and those persons are entitled to have their legal interests represented by one who is trained and licensed to do so. This is not to say that personal representatives must be attorneys, but, rather, that one who seeks to represent the legal interests of the personal representative must be an attorney. This rule protects the estate, its heris, and its creditors.

The Nebraska Supreme Court has held that the term "practice of law" includes the trial of causes in court and the preparation of pleadings to be filed in court. State, ex rel. Wright v. Barlow, 131 Neb. 294, 268 N.,w. 95 (1936). See, also, State, ex rel. Hunter, v. Kirk, 133 Neb. 625, 276 N.W. 380 (1937); Spier v. Thomas, 131 Neb. 579, 269 N.W. 61 (1936). The statute, 7-101, prevents the filing of any paper in any action "unless the same bears the endorsement of some admitted attorney, or is drawn, signed, and presented by a party to the action or proceeding." Here, the pleadings were not signed by an admitted attorney, but, rather, by Waite, and it is only where a party acts in a nonrepresentative capacity that he may

file his own pleadings. There can be no question that Waite was engaged in the practice of law in violation of 7-101.

The district court for Scotts Bluff County found that there was no genuine issue of material fact and that the defendants were entitled to judgment as a matter of law, citing Back Acres Pure Trust v. Fahnlander, 233 Neb. 28, 443 N.W.2d 604 (1989). The court entered summary judgment for the defendants against the plaintiff and dismissed Waite's actions. Accordingly, we now consider whether the district court correctly dismissed Waite's lawsuits.

In Back Acres Pure Trust, E.L. Peister, a nonlawyer and nonparty, filed a brief amd argued to the Supreme Court on a pro se basis. The Supreme Court said that Piester had represented to the trial court that he was a trustee and that he would furnish the appropriate evidence thereof, but no such showing was made. he had signed the appellants' brief on behalf of himself and the appellants, but in actuality he had no authority to appear pro se as a trustee "and certainly not as a representative of appellants." Id. at 29, 443 N.W.2d at 605. The Supreme Court said that because "Piester had no authority to file a brief in this matter, either in his own behalf or on behalf of appellants, appellants' briefs are stricken, and the appeal is dismissed." Id.

Niklaus v. Abel Construction Co., 164 Neb. 842, 83 N.W.2d 904 (1957), involved a petition with nine causes of action alleging illegal contracts, and payments thereunder, by the city of Lincoln to Abel Construction Company. The plaintiff, William Niklaus, brought the action "for the benefit and in behalf of the City of Lincoln" and prayed for judgment "for benefit of city of Lincoln, Nebraska" in the sum of $1,000,000. Id. at 843, 83 N.W.2d at 906-07. Niklaus was a disbarred attorney who had never been

reinstated, and the court adopted the rule that "'[w]hile a layman may represent himself in court he cannot even on a single occasion represent another, whether for a consideration or not,'" Id. at 852, 83 N.W.2d at 911.

The court found that Niklaus concieved the action, made the investigation, and drafted the petition. He was characterized as "the moving spirit," and his particiaption was said to be "not casual but persistent and continuous." Id. The court adopted the rule that proceedings in a suit by a person not entitled to practice law are a nullity, and the suit may be dismissed. The court in Niklaus recognized that dismissal was a drastic remedy and is not required in all cases, but that the extent of the unlawful practice by Niklaus required dismissal. The court held that "[t]he flagrant and persistent unlawful practice of law in this case by Mr. Niklaus requires that the proceedings be held to be a nullity and the action dismissed." Id. at 852-53, 83 N.W.2d at 911.

At this juncture, we quote from Niklaus:

> This action is not taken for the benefit of lawyers who are duly admitted to the practice of the law in this state. As was said by the Supreme Court Colorado in Bennie v. Triangle Ranch., 73 Colo. 586, 216 P. 718, it is "for the protection of citizens and litigants in the administration of justice, against the mistakes of the ignorant on the one hand, and the machinations of unscrupulous on the other.."

164 Neb. at 852, 83 N.W.2d at 911.

We also find it appropriate to quote the rationale concerning the prohibition against the unauthorized practice of law from State, ex rel. Wright v. Barlow, 131 Neb. 294, 268 N.W. 95 (1936):

This court possesses inherent power to

> protect itself and its officers from any interference with its functions as a court. This it may do, not only for the purpose of protecting the court and its officers, but in the interest of the public at large to prevent it from being exploited and injured by one unlawfully assuming to act as an officer of the court. There are many instances where persons' rights have been jeopardized and sacrificed because of following the counsel and advice of unlicensed persons, giving or attempting to give legal advise.

Id. at 302, 268 N.W. at 98-99.

In summary, the rule against nonattorneys practicing law for others is not to perpetrate a professional monpoly, but, rather, (1) to protect citizens from injury casued by the ignorance and lack of skill on the part of those who are untrained and inexperienced in the law, (2) to protect the courts in their administration of justice from interference by those who are unlicensed and are not officers of the court, and (3) to prevent the unscrupulous from using the legal system for their own purposes to the harm of the system and those who may knowingly rely upon them.

We first address the administration of justice and observe that on September 3, 1991, the district court for Scotts Bluff County, with both judges present (apparently because of their method of assignment of cases), took up five lawsuits filed by Waite arising out of the death of Harriet Waite. We have only three of those five cases before us, but observe that there is an obvious multiplicity of litigation when one or two lawsuits surely would have covered all the claims and the defendants. In addition, there is a corresponding multiplicity of effort on the part of the district court, and now this court, in

dealing with Waite's multiple cases.

Waite attempted to bring these lawsuits for the next of kin, which as we have observed quite probably included a husband, a daughter, and other family. He filed the lawsuits a matter of days before the running of the statute of limitations. It serves no purpose to discuss the allegations in detail except to observe that after numerous "Complaint[s]," Waite has not stated a proper cause of action. At the simplest level, to the extent that the heirs were relying upon Waite to prosecute a medical negligence action for the death of Harriet Waite, he was unable to take the basic frist step by filing a proper petition which states a cause of action against each of the people or entities he was trying to sue. To the extent that heirs relied on Waite, their reliance was misguided because he tried to do that which he was legally prohibited from doing, and obviously incapable of accomplishing.

In this regard, we observe that litgation involving allegations of medical negligence is difficult and specialized work. Duly admitted and licensed lawyers often seek the asistance of other lawyers who possess particular skills acquired through training and experience in order to ensure effective representation for their clients who seek to assert such claims. In other words, Waite was treading where some lawyers fear to go.

When we view the matter from the prospective of the defendants, W. Scott Carpenter and Regional West Medical Center were unnecessarily named as defendants in all three of these cases. Defendant Terry Himes was named in two of the cases. A person should not be vexed more than once for the same cause. See Security State Bank v. Gugelman, 230 Neb. 842, 434 N.W.2d 290 (1989).

We believe that the violations of the statutory prohibition against the unauthorized practice of law by Waite were flagrant and persistent. We do not know whether the cases have one shred of merit, but if so, the heirs may well have been harmed by Waite's unskillful attempts to prosecute these actions on their behalf. Finally, the defendants and the courts were unnecessarily vexed and faced with duplicative lawsuits.

Waite argues that the district court for Scotts Bluff County abused its discretion by failing to give him time in which to secure counsel prior to the dismissal of the actions and that his multiple pleadings were in response to motions filed by the defendants. No authority is cited for the propostion that the defendants should defend less aggressively or allow the plaintiff to use improper pleadings meerly because the lawsuit is being brought by one unauthorized to do so, and we think the law is clearly otherwise. If the district court for Scotts Bluff County, and now this court, were to allow Waite additional time for the retention of counsel instead of using dismissal as the remedy, then Waite would have engaged in the unauthorized practice of alw to the possible detriment of the heirs, the defendants, and the courts with complete impunity. The district court did not abuse its discretion in failing to give Waite time to retain counsel. We decline to save him from the consequences of his acts. Given that Harriet Waite died nearly 2 years prior to the institution of suit, Waite had ample time to retain counsel prior to the filing of these cases.

For the reasons stated above, the decisions of the district court dismissing these three cases are affirmed in all respects. AFFIRMED.

IN THE DISTRICT COURT OF SCOTTS BLUFF COUNTY, NEBRASKA

GLENN R. WAITE Plaintiff, vs. W. SCOTT CARPENTER , M.D., et. al. Defendants.	)))))))	No. 38271 AMENDED MOTION TO VACATE JUDGMENT OF DISMISSAL

COMES NOW, Plaintiff, Glenn R. Waite, duly appointed, qualified and acting Personal Representative and sole distributee, sole beneficiary, and sole heir at law under intestate succession in interest in the matter of the estate of Harriet I. Waite, deceased, and hereby amends his amended motion to vacate judgment of dismissal filed on or about December 6, 1993 and addresses the chancery power of this court and moves this court to vacate its judgment of dismissal entered September 5, 1991 based on the following grounds only:

(1) this court lacked subject matter jurisdiction to determine the issue of the unauthorized practice of law by the Personal Representative which requires determination of who are the legal next of kin of the decedent and how the estate would be distributed which is the exclusive original jurisdiction of the county probate court. See Neb. Rev. Stat. 24-517 (1), 30-2211 (Reissue 1989).

(2) this court lacked subject matter jurisdiction to take any form of discipline against the Personal Representative of the decedent for an alleged breach of fiduciary duty until the estate had been placed in the hands of the distributees. See Neb. Rev. Stat. 24-517(1), 30-2211 (Reissue 1989); In Re Estate of Saas, 154 N.W.2d 456 (1967) and Line v. Rouse, 241 Neb. 779 (1992).

(3) At least one of the Judges who presided in the hearing held September 3, 1991 had a pecuniary interest in the cause of action. This party was not afforded a fair trial or hearing due to the Judge's pecuniary interest. Any judgment rendered by that disqualified Judge is null and void due to lack of jurisdiction by the Judge. See Neb. Rev. Stat. 24-739 (Cumm. Supp. 1992) and Walters v. Wiley, 95 N.W. 486 (1901).

This court's entry of the Summary Judgment of dismissal for defendants and against plaintiff on September 5, 1991 works a substantial injury to this plaintiff's right to recover the avails of the lawsuit on behalf of himself who is the sole distributee, sole beneficiary and sole heir at law under intestate succession of the decedent's estate.

Plaintiff has attached to this Amended Motion a true copy of his letters of Personal Representative, decree of heirship, Renunciation of Succession, affidavit and assignment by Peter A. Waite, Beverly E. Sipple, and Doris R. Butler.

Plaintiff states that it was this court who rendered the judgment of dismissal on September 5, 1991 and that this court has the inherent jurisdiction to vacate its own void orders or void judgments due to lack of jurisdiction. A motion or petition for this purpose may be brought in any action, direct or collateral, including an independent equity action.

Plaintiff has attached to this motion a copy of the requests to admit facts served upon the defendant, Regional West Medical Center, on or about the 26th of November 1993. The defendant did serve a response of objection based on the defense that the case was no longer pending, but this court never sustained the objection and thirty days have expired pursuant to the Nebraska Discovery Rules. Therefore the facts are deemed admitted.

Plaintiff has attached a brief to this motion.

Plaintiff requests that he be permitted to plead further to prosecute this action against the defendants.

WHEREFORE, Plaintiff, Glenn R. Waite, prays that this court vacate its judgment of dismissal entered September 5, 1991 due to lack of jurisdiction since it works a substantial injury to his rights as sole distributee, sole beneficiary, and sole heir at law under intestate succession in the matter of the estate of Harriet I. Waite, deceased. Plaintiff prays for a hearing to be held in order that he be permitted to prove his grounds for vacating judgment due to lack of jurisdiction of this court. Plaintiff prays that he be permitted to plead further in this action.

Glenn R. Waite
Plaintiff
1202 W. 28th St.
Cheyenne, WY 82001
307-634-8712

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he mailed a true and correct copy of the foregoing AMENDED MOTION TO VACATE JUDGMENT to Mark E. Novotny, 10306 Regency Parkway Dr., Omaha, NE 68114; James A. Snowden, 1000 NBC Center, Lincoln, NE 68508; and Robert P. Chaloupka, 1904 First Ave., P.O. Box 1204, Scottsbluff, NE 69363 by regular U.S. mail, postage prepaid, on this the 18th day of January 1994.

Glenn R. Waite

Attachments to Motion to Vacate Judgment:

IN THE COUNTY COURT OF
SHERIDAN COUNTY, NEBRASKA

IN THE MATTER OF	)	No. PR90-78
THE ESTATE OF	)	LETTERS OF PERSONAL
HARRIET I. WAITE,	)	REPRESENTATIVE
Deceased	)	

THE STATE OF NEBRASKA
KNOW ALL MEN BY THESE PRESENTS:

WHEREAS, on January 2, 1991, Glen R. Waite was appointed and qualified as Personal Representative of the above-named Decedent by this Court or its Registrar, with all the authority granted to a personal representative by law.

NOW, THEREFORE, these Letters are issued as evidence of such appointment and qualifiations and authority of Glen R. Waite do to and perform all acts which may be authorized by law.

WITNESS, the signature of a Judge or Resgistrar of this Court, and the seal of this Court January 2, 1991.

Julie Krotz
Registrar of the
County Court of
Sheridan County,
Nebraska

Seal

IN THE COUNTY COURT OF
SHERIDAN COUNTY, NEBRASKA

IN THE MATTER OF	)	No. PR90-78
THE ESTATE OF	)	DECREE -
HARRIET I. WAITE,	)	DETERMINATION OF
Deceased	)	HEIRSHIP & SUCCESSION

The petition of Glenn R. Waite, filed herein, for a decree determining heirship and succession in the above-named estate, coming on for hearing on January 5, 1994; and

It appearing to the court that notice of the hearing has been given as required by Neb. Rev. Stat. 30-2220 (Cumm. Supp. 1993); and after hearing the evidence and arguments of petitioner,

It is hereby, ordered, adjudged, and decreed that Harriet I. Waite, Deceased, died intestate on April 17, 1989, leaving surviving here as her only heirs at law the persons whose names and relationship to said decedent are as follows:

Peter A. Waite, spouse
Glenn R. Waite, natural son
Doris R. Butler, natural daughter
Beverly E. Sipple, natural daughter

JAN 5, 1994
Seal

_____
County Judge

IN THE COUNTY COURT OF
SHERIDAN COUNTY, NEBRASKA

IN THE MATTER OF	)	No. PR90-78
THE ESTATE OF	)	RENUNCIATION OF
HARRIET I. WAITE,	)	SUCCESSION
Deceased	)	

COMES NOW, Peter A. Waite, widower of the above decedent, and renounces any and all interest that he, the undersigned, might have in any property, causes of action, including survival and wrongful death claims, or assets of the estate of the above decedent including but not limited to any cause of action existing against Richard A. Savage, M.D., W. Scott Carpenter, M.D., Armando J. Mangana, M.D., William M. Packard, M.D., Terry M. Himes, D.O., Larry O'Holleran, M.D., Scottsbluff Internal Medicine Group,Regional West Medical Center and/or any its employees including but not limited to Nancy Adams, Connie Mount, Jana Haick, Donna Rusen and Judy Bowlin and any and all causes of action against any attorney who may have negligently handled

any cause of action on behalf of Harriet I. Waite or her estate, including but not limited to Alexander Davison, Robert Hampe, and Jim L. Brown.

This renunciation is irrevocable and constitutes an unqualified refusal to accept any interest whatsoever or any property or rights of the above decedent or her estate. The undersigned has read and knows the contents of the above document.

_____
Peter A. Waite

ACKNOWLEDGMENT:

Before me personally appeared Peter A. Waite and he acknowledged the above document and signed the execution of the above in my presence.

_____
Notary Public

Dated the 17th of Sept. 1993.

IN THE COUNTY COURT OF
SHERIDAN COUNTY, NEBRASKA

IN THE MATTER OF	)	
THE ESTATE OF	)	NO. PR90-78
HARRIET I. WAITE,	)	ASSIGNMENT
Deceased	)	

COMES NOW, Peter A. Waite, widower of the above decedent, and states that he has no objection to his son, Glenn R. Waite, heir of the above decedent and Personal Representative of the above decedent, assigning to himself, individually, any and all causes of action against Richard A. Savage, M.D., W. Scott Carpenter, M.D., Armando J. Mangana, M.D., William M. Packard, M.D. Terry Mark Himes, D.O., Larry O'Holleran, M.D., Scottsbluff Internal Medicine Group, Regional West Medical Center and/or any of its employees including but not limited to Nancy Adams, Connie Mount, Jana Haick, Donna Rusen and Judy Bowlin and any and all causes of action against any attorney who may have negligently handled the above causes of action including but not

limited to Alexander Davison, Robert Hampe, and Jim L. Brown.

Peter A. Waite

ACKNOWLEDGMENT:

Before me personally appeared Peter A. Waite and he acknowledged the above document and signed the execution of the above document in my presence.

Notary Public

Dated this the 17th day of Sept 1993.

IN THE COUNTY COURT OF
SHERIDAN COUNTY, NEBRASKA

IN THE MATTER OF THE ESTATE OF HARRIET I. WAITE, Deceased	)	NO. PR 90-78 AFFIDAVIT

STATE OF NEBRASKA)
) ss.
COUNTY OF SHERIDAN)

Peter A. Waite makes this affidavit based on personal knowledge and deposes and states upon oath:

1. He is the widower of the above decedent and the above decedent died without a will.

2. The only asset in the Estate of the above decedent is a chose in action involving a claim for negligence in the care and treatment of Harriet I. Waite and a claim for wrongful death. There are no other assets of the Estate real or personal.

3. He did not at any time request or rely on his son, Glenn R. Waite, Personal Representative of the Estate, to prosecute on his behalf any cause of action, including survival and wrongful death claims, in connection with the above Estate nor did he at any time advance or pay court costs, attorney fees, or any other expenses of litigation or give security for costs in order to prosecute said causes of action.

FURTHER AFFIANT SAYETH NOT.

Peter A. Waite

Subscribed and sworn to before me this the 17th day of Sept 1993.

Notary Public

IN THE COUNTY COURT OF
SHERIDAN COUNTY, NEBRASKA

IN THE MATTER OF	)	No. PR90-78
THE ESTATE OF	)	RENUNCIATION OF
HARRIET I. WAITE,	)	SUCCESSION
Deceased	)	

COMES NOW, Doris R. Butler, daughter of the above decedent, and renounces any and all interest the she might have in any property, causes of action, including survival and wrongful death claims, or assets of the estate of the above decedent including but not limited to any cause of action existing against Richard A. Savage, M.D., W. Scott Carpenter, M.D., Armando J. Mangana, M.D., William M. Packard, M.D., Terry M. Himes,D.O., Larry O'Holleran, M.D., Scottsbluff Internal Medicine Group,Regional West Medical Center and/or any of its employees and any and all causes of action against any attorney who may have negligently handled any cause of action on behalf of Harriet I. Waite or her estate. This renunciation is irrevocable and constitutes an unqualified refusal to accept any interest whatsoever or any property or rights of the above decedent or her estate. The undersigned has read and knows the contents of the above document.

Doris R. Butler

ACKNOWLEDGMENT:

Before me personally appeared Doris R. Butler and she acknowledged the above document and signed the execution of the

above in my presence.

_____
Notary Public

Dated this the 23 day of September 1993.

IN THE COUNTY COURT OF
SHERIDAN COUNTY, NEBRASKA

IN THE MATTER OF	)	
THE ESTATE OF	)	NO. PR90-78
HARRIET I. WAITE,	)	ASSIGNMENT
Deceased	)	

COMES NOW, Doris R. Butler, daughter of the above decedent, and states that she has no objection to her brother, Glenn R. Waite, heir of the above decedent and Personal Representative of the above decedent, assigning to himself, individually, any and all causes of action against Richard A. Savage, M.D., W. Scott Carpenter, M.D., Armando J. Mangana, M.D., William M. Packard, M.D. Terry Mark Himes, D.O., Larry O'Holleran, M.D., Scottsbluff Internal Medicine Group, Regional West Medical Center and/or any of its employees and any and all causes of action against any attorney who may have negligently prosecuted any of the above causes of action on behalf of the above decedent or her estate.

_____
Doris R. Butler

ACKNOWLEDGMENT:

Before me personally appeared Doris R. Butler and she acknowledged the above document and signed the execution of the above document in my presence.

_____
Notary Public

Dated this the 23 day of September 1993.

IN THE COUNTY COURT OF
SHERIDAN COUNTY, NEBRASKA

IN THE MATTER OF THE ESTATE OF HARRIET I. WAITE, Deceased	)))	NO. PR 90-78 AFFIDAVIT OF DORIS R. BUTLER

STATE OF MINNESOTA)
) ss.
COUNTY OF WASHINGTON)

Doris R. Butler, being first duly sworn on oath, makes this Affidavit based upon personal knowledge and deposes and states as follows:

1. She is the natural daughter of the above decedent, Harriet I. Waite.

2. The only asset in the Estate of the above decedent is a chose in action involving a claim for negligence in the care and treatment of Harriet I. Waite and a claim for wrongful death. There are no other assets of the Estate real or personal.

3. She did not at any time request or rely on her brother, Glenn R. Waite, heir of the above decedent and personal representative of the above decedent, to prosecute on her behalf any cause of action, including survival and wrongful death claims, in connection with the above decedent or her estate nor did she at any time advance or pay court costs, attorney fees, or any other expenses of litigation or give security for costs in order to prosecute said causes of action.

FURTHER AFFIANT SAYETH NOT.

Doris R. Butler

Subscribed and sworn to before me this the 23 day of September 1993.

Notary Public

IN THE COUNTY COURT OF
SHERIDAN COUNTY, NEBRASKA

IN THE MATTER OF THE ESTATE OF HARRIET I. WAITE, Deceased	)))	No. PR90-78 RENUNCIATION OF SUCCESSION

COMES NOW, Beverly E. Sipple (formerly Beverly Burg), daughter of the above decedent, and renounces any and all interest which she might have in any property, causes of action, including survival and wrongful death claims, or assets of the estate of the above decedent including but not limited to any cause of action existing against Richard A. Savage, M.D., W. Scott Carpenter, M.D., Armando J. Mangana, M.D., William M. Packard, M.D., Terry M. Himes,D.O., Larry O'Holleran, M.D., Scottsbluff Internal Medicine Group, Regional West Medical Center and/or any of its employees and any and all causes of action against any attorney who may have negligently handled any cause of action on behalf of Harriet I. Waite or her estate. This renunciation is irrevocable and constitutes an unqualified refusal to accept any interest whatsoever or any property or rights of the above decedent or her estate. The undersigned has read and knows the contents of the above document.

_____
Beverly E. Sipple

ACKNOWLEDGMENT:

Before me personally appeared Beverly E. Sipple and she acknowledged the above document and signed the execution of the above in my presence.

_____
Notary Public

Dated this the 12TH day of OCTOBER 1993.

IN THE COUNTY COURT OF
SHERIDAN COUNTY, NEBRASKA

IN THE MATTER OF THE ESTATE OF HARRIET I. WAITE, Deceased	)))	No. PR90-78 ASSIGNMENT

COMES NOW, Beverly E. Sipple (formerly Beverly Burg), daughter of the above decedent, and states that she has no objection to her brother, Glenn R. Waite, heir of the above decedent and Personal Representative of the above decedent, assigning to himself, individually, any and all causes of action against Richard A. Savage, M.D., W. Scott Carpenter, M.D., Armando J. Mangana, M.D., William M. Packard, M.D. Terry Mark Himes, D.O., Larry O'Holleran, M.D., Scottsbluff Internal Medicine Group, Regional West Medical Center and/or any of its employees and any and all causes of action against any attorney who may have negligently prosecuted any of the above causes of action on behalf of the above decedent or her estate.

_____
Beverly E. Sipple

ACKNOWLEDGMENT:

Before me personally appeared Beverly E. Sipple and she acknowledged the above document and signed the execution of the above document in my presence.

_____
Notary Public

Dated this the 12TH day of OCTOBER 1993.

IN THE COUNTY COURT OF
SHERIDAN COUNTY, NEBRASKA

IN THE MATTER OF THE ESTATE OF HARRIET I. WAITE, Deceased	)))	No. PR90-78 AFFIDAVIT OF BEVERLY E. SIPPLE

STATE OF MICHIGAN)
) ss.
COUNTY OF _____)

Beverly E. Sipple, being first duly sworn on oath, makes this Affidavit based upon personal knowledge and deposes and states as follows:

1. She is the natural daughter of the Harriet I. Waite.

2. The only asset in the Estate of the above decedent is a chose in action involving a claim for negligence in the care and treatment of Harriet I. Waite and a claim for wrongful death. There are no other assets of the Estate real or personal.

3. She did not at any time request or rely on her brother, Glenn R. Waite, heir of the above decedent and personal representative of the above decedent, to prosecute on her behalf any cause of action, including survival and wrongful death claims, in connection with the above decedent, Harriet I. Waite, or her estate nor did she at any time advance or pay court costs, attorney fees, or any other expenses of litigation or give security for costs in order to prosecute said causes of action.

FURTHER AFFIANT SAYETH NOT.

_____
Beverly E. Sipple

Subscribed and sworn to before me this the 12TH day of October 1993.

_____
Notary Public

IN THE DISTRICT COURT OF SCOTTS BLUFF COUNTY, NEBRASKA

GLENN R. WAITE)
Plaintiff,) NO. 38271
vs.)
W. SCOTT CARPENTER,)
M.D., et.al.,)
Defendants.)

REQUESTS TO ADMIT FACTS

TO: REGIONAL WEST MEDICAL CENTER:

Plaintiff, Glenn R. Waite, requests Defendant, Regional West Medical Center, to make the following admissions, within thrity days after service of this request:

That each of the following facts are true:

1. Harriet I. Waite died on April 17, 1989 while under the care of the employees of Regional West Medical Center. Her death was not instantaneous.

2. Harriet I. Waite was capable of making her own medical decisions prior to death.

3. The employees of Regional West Medical Center while attending to the care of their client, Harriet I. Waite, made her a "no code" patient on April 13, 1989 without her informed consent.

4. The employees of Regional West Medical Center administered morphine to Harriet I. Waite against her expressed wishes while attending to the care of Harriet I. Waite.

5. The employees of Regional West Medical Center while attending to the care of Harriet I. Waite observed and recorded signs of morphine overdoseage experienced by Harriet I. Waite and failed to treat the morphine overdoseage.

6. Approximately two days prior to her death, the employee(s) of Regional West Medical Center withdrew food and water from Harriet I. Waite and failed to provide her with food and adequate water prior to death.

7. On the day of death, the employees of Regional West Medical Center while attending to the care of Harriet I. Waite, failed to protect Harriet I. Waite from the negligence of William Scott Carpenter, M.D. who increased the morphine infusion at the same time Harriet Waite was experiencing signs of morphine overdoseage.

8. On the day of death, the employees of Regional West Medical Center while attending to the care of Harriet I. Waite, failed to perform cardio-pulmonary resuscitation on Harriet I. Waite.

9. Ann Hippe, wife of Judge Robert O. Hippe, was or is presently an employee of Regional West Medical Center or is paid with funds derived from Regional West Medical Center.

10. Ann Hippe, wife of Judge Robert O. Hippe, is a registered nurse and is presently or was previously employed by Regional West Medical Center in the capacity of Instructor in the School of Nursing which is an affiliate of the University of Nebraska and receives funds from the State of Nebraska.

11. Ann Hippe, wife of Judge Robert O. Hippe, was on September 3, 1991 an employee of Regional West Medical Center.

According to Nebraska law, Defendant, Regional West Medical Center, must serve a response within thirty days or the matters requested will be deemed admitted.

_____

Glenn R. Waite
Plaintiff
1202 West 28th St.
Cheyenne, WY 82001
307-634-8712

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he mailed a true and correct copy of the REQUESTS TO ADMITS FACTS FROM PLAINTIFF, GLENN R. WAITE to James A. Snowden, 1000 NBC Center, Lincoln, NE 68508; Robert P. Chaloupka, 1904 First Avenue, P.O. Box 1204, Scottsbluff, NE 69361; and William M. Lamson, Jr., 10306 Regency Parkway Dr., Omaha, NE 68114 by regular U.S. Mail this the 26th day of November 1993.

_____

Glenn R. Waite

End of attachments to Motion to Vacate.

IN THE DISTRICT COURT OF SCOTTS BLUFF COUNTY, NEBRASKA

GLENN R. WAITE	)	NO. 38271
Plaintiff,	)	AMENDED
vs.	)	PETITION
W. SCOTT CARPENTER,	)	JURY TRIAL
M.D., et. al.	)	DEMANDED
Defendants.	)	

COMES NOW, Plaintiff, Glenn R. Waite, to amend his petition pursuant to section 25-849 of the Neb. Rev. Stat. (Reissue 1989) in that defendants have not filed an answer pursuant to section 25-811 of the Neb. Rev. Stat. (Reissue 1989) and alleges a cause of action against the defendants as follows:

1. Plaintiff, Glenn R. Waite, is the duly appointed, qualified, and acting Personal Representative of his deceased mother, Harriet I. Waite, and is sole heir at law of the decedent's estate under intestate succession. Plaintiff represents himself in this action, is the only real party in interest and represents the interests of no other person other than himself. Plaintiff resides at 1202 W. 28th St., Cheyenne, WY 82001.

2. Harriet Ione Waite died intestate on April 17, 1989 due mainly to large doses of morphine under the care of defendants. Harriet I. Waite shall be referred to "intestate" herein. Intestate at the time of death resided at Hay Springs, Nebraska, County of Sheridan. Intestate was survived by a spouse, Peter A. Waite, and three adult children: Beverly E. Sipple, Doris R. Butler, and Glenn R. Waite. There are no other heirs natural or legal. Peter A. Waite, Beverly E. Sipple, and Doris R. Butler have filed an irrevocable renunciation of succession pursuant to section 30-2352 of the Neb. Rev. Stat., and an affidavit with the clerk of the probate court of Sheridan County, Nebraska. These

documents are attached to this amended petition. Glenn R. Waite is the sole remaining next of kin.

3. Plaintiff, Glenn R. Waite, is bringing this action as Personal Representative of his deceased mother for the wrongful act of the defendants which resulted in death and if death had not ensued it would have entitled his decedent mother to maintain this action against the defendants. The amount recovered is for the benefit of Glenn R. Waite, as sole next of kin under intestate succession as provided by law in relation to the distribution of personal property left by decedent who died intestate under the provisions of the Lord Campbell Act and section 25-809, 25-810 of the Neb. Rev. Stat.

4. The District Court of Scotts Bluff County is the proper court in that the controversy involves relief for a sum greater than $10,000. Venue is proper in that the cause of action occurred in Scotts Bluff County and the defendants provide goods and services in Scotts Bluff County, Nebraska.

5. Defendant, W. Scott Carpenter, M.D., was a physician licensed under the laws of the State of Nebraska and was a physician practicing in partnership with other physicians at Scottsbluff Internal Medicine Group, P.C., 4009 Avenue B., Suite 2A, Scottsbluff, NE 69361 at all times in reference to this cause of action. Other physicians in partnership at the time of this cause of action were: Todd S. Sorensen, M.D., William A. Siefert, M.D., Terry L. Haney, M.D., William M. Packard, M.D., Vince G. Bjorling, M.D., and Armando J. Mangana, M.D. Defendant, Carpenter, is Board Certified in Internal Medicine with a subspecialty in pulmonary disease.

6. Defendant, Terry Mark Himes, D.O., was a physician licensed under the laws of

the State of Nebraska and Board Certified in Neurology. He was a physician practicing with Ernest W. Beehler, M.D. in a partnership known as Scottsbluff Neurological Associates, P.C. located at 4009 Avenue B., Scottsbluff, NE at all times in reference to this cause of action.

7. Defendant, Larry O'Holleran, M.D., was a physician who was licensed under the laws of the State of Nebraska and Board Certified in general surgery at all times in reference to this cause of action. Defendant, Larry O'Holleran, was practicing in partnership with other physicians in a partnership known as Forney Westerbuhr Surgical Associates, P.C. located at 2 W. 42nd St., Scottsbluff, NE 69361 at all times in reference to this cause of action. Other physicians in partnership at the time of this cause of action were Glen A. Forney, M.D. and Lloyd M. Westerbuhr, M.D.

8. Defendant, Jama Houck, R.N. was employed by defendant, Regional West Medical Center, in the capacity of registered nurse at all times in reference to this cause of action. Jama Houck, R.N. during the course of her employment at Regional West Medical Center attended to the care of Harriet I. Waite.

9. Defendant, Donna Rusen, R.N., was employed by defendant, Regional West Medical Center, in the capacity of registered nurse at all times in reference to this cause of action. Donna Rusen, R.N. during the course of her employment at Regional West Medical Center attended to the care of Harriet I. Waite.

10. Defendant, Judy Bowlin, L.P.N., was employed by defendant, Regional West Medical Center, in the capacity of licensed practical nurse at all times in reference to this cause of action. Judy Bowlin, L.P.N. during the course of her employment at Regional West Medical Center attended to the

care of Harriet I. Waite.

11. Linda Moreno, R.N. was employed by the defendant, Regional West Medical Center, in the capacity of registered nurse at all times in reference to this cause of action. Linda Moreno, R.N. during the course of her employment at Regional West Medical Center attended to the care of Harriet I. Waite.

12. Nancy Adams, R.N. was employed by defendant, Regional West Medical Center, in the capacity of registered nurse at all times in reference to this cause of action. Nancy Adams, R. N. during the course of her employment at Regional West Medical Center attended to the care of Harriet I. Waite.

13. Connie Mount, R.N. was employed by defendant, Regional West Medical Center, in the capacity of registered nurse at all times in reference to this cause of action. Connie Mount, R.N. during the course of her employment at Regional West Medical Center attended to the care of Harriet I. Waite.

14. Marlene H. McKeown, R.N. was employed by defendant, Regional West Medical Center, in the capacity of registered nurse at all times in reference to this cause of action. Marlene H. McKeown, R.N. during the course of her employment at Regional West Medical Center attended to the care of Harriet I. Waite.

15. Defendant, Regional West Medical Center, is an acute care general hospital licensed under the laws of the State of Nebraska and was accredited by the Joint Commission on Accreditation of Health Care Organizations at all times in reference to this cause of action. Regional West Medical Center is a major teaching affiliate of the University of Nebraska and receives funds from the State of Nebraska. Defendant's address is 4021 Avenue B., Scottsbluff, NE 69361.

16. Glenn R. Waite, M.D., natural son of Harriet I. Waite acted as her agent on

several admissions to Regional West Medical Center. On April 2, 1989, Harriet I. Waite was admitted to Regional West Medical Center under the care of William Packard, M.D. On the day of admission, Glenn R. Waite, M.D. signed the admission contract on her behalf since she had recently become paralyzed and could not write.

17. Harriet Ione Waite was known to be of sound mind and prior to death had the capacity to communicate and make her own decisions.

18. The defendants, W. Scott Carpenter, M.D., Terry Mark Himes, D.O., Larry O'Holleran, M.D., Jama Houck, R.N., Donna Rusen, R.N., Judy Bowlin, L.P.N. and Regional West Medical Center are joint tortfeasors and by their independant acts united in causing injuries resulting in wrongful death.

19. On or about July 25, 1985, intestate consulted Dr. Terry Haney, M.D., a physician member of the Scottsbluff Internal Medicine Group, P.C. Thereafter intestate was referred to defendant, W. Scott Carpenter, M.D. for ongoing treatment of arthritis and hypertension. Defendant, Carpenter, was her primary care physician from October 1985 until the date of her death on April 17, 1989.

20. On April 2, 1989, intestate was admitted to Regional West Medical Center under the care of William Packard, M.D., a physician member of the Scottsbluff Internal Medicine Group, P.C. Intestate was admitted for treatment of slowly progressive lower extremity weakness, recent neurological changes with upper extremity paralysis, facial paralysis, laryngeal dysphagia and recurrent aspiration pneumonia. While under the care of William Packard, M. D. and W. Scott Carpenter, M.D.intestate died. The cause of death was mainly from excessive doses of morphine. Negligent treatment of

recurrent aspiration pneumonia and polymyositis and withdrawal of fluid and food may have contributed to death by requiring lower doses of morphine to kill the intestate.

21. On or about April 4, 1989 after meeting defendant, Carpenter, for the first time, defendant, Carpenter, requested me (Glenn R. Waite, M.D.) to discuss cardio-pulmonary resuscitation with my mother (intestate). I did discuss cardio-pulmonary resuscitation with my mother, Harriet I. Waite. She mentioned that she had studied cardio-pulmonary resuscitation in her nurses aide course. She requested that everything possible to be done that could be done in treatment of her condition. I asked if that included cardio-pulmonary resuscitation and she said, "yes". She asked that I communicate this information to Dr. Carpenter. I did communicate this to Dr. Carpenter in the presence of Beverly Sipple, daughter of the decedent. Defendant, Carpenter, recorded in the medical record of Harriet I. Waite, "she requests full code".

22. From April 2, 1989 to April 17, 1989, the joint tortfeasors, described in paragraph 18 above, committed independant tortious acts which united together conspired to cause the intestate's death by a sequence of unbroken events as described in the following paragraphs:

23. From April 2, 1989 to April 17, 1989, defendant, Carpenter, attended to the care of the intestate and negligently treated intestate's polymyositis and recurrent aspiration pneumonia. Defendant, Carpenter, was required to exercise the ordinary and reasonable care and skill of other regularly practicing primary care physicians. Defendant, Carpenter, failed to exercise the ordinary and reasonable care and skill and ability of a Board Certified

Primary Care physician and as a result intestate suffered injuries leading to death.

24. From April 2, 1989 to April 17, 1989, defendant, Himes, attended to the care of the intestate and negligently treated intestate's polymyositis and recurrent aspiration pneumonia. Defendant, Himes, was required to exercise the ordinary and reasonable care and skill of other regularly practicing Neurologists. Defendant, Himes, failed to exercise the ordinary and reasonable care and skill and ability of a Board Certified Neurologist and as a result intestate suffered injuries leading to death.

25. On April 11, 1989, defendant, Larry O'Holleran, performed an ill timed muscle biopsy. Such surgery was an elective procedure and was not performed in order to save intestate's life. Defendant, O'Holleran, was negligent in that he performed an elective surgery at a time when the intestate was being treated for an acute illness and could have postponed the surgery until the intestate was out of her acute illness and stable. A reasonable practitioner in the specialty of general surgery would have exercised reasonable and ordinary care, skill and ability in the timing of the muscle biopsy and in obtaining the intestate's informed consent. A prudent patient in intestate's position would not have consented to surgery provided by defendant had it been disclosed to her that the surgery would make her condition worse. The ill timing of the surgery and a lack of informed consent caused a proximate injury to Harriet I. Waite by starting a sequence of events leading to death. By lack of due diligence, defendant, O'Holleran, failed to inform me (Glenn R. Waite, M.D.) in regard to the timing of this surgery. Had I been informed, I could have protected my mother

from harm. Defendant, O'Holleran, failed to perform his profession in a skillful diligent manner and as a direct result, intestate's condition became aggravated by requiring pain medication which made her more vulnerable to further aspiration events thus making her aspiration pneumonia worse and causing intense pain and suffering, increased breathing difficulty and death.

26. On April 13, 1989, Defendant, Carpenter, gave a telephone order to Linda Moreno, R.N. and Nancy Adams, R.N. for a "no code order". This means do not treat this patient with cardio-pulmonary resuscitation. This order was made without intestate's authorization or informed consent. Intestate at that time was of sound mind and capable of making her own medical decisions. Intestate had a right to self determination and defendant, Carpenter, failed to respect that right. Lack of informed consent resulted in proximate injury to intestate leading to death. Defendant, Carpenter, did not inform me (Glenn R. Waite, M.D.) that he had made the subject a "no code" patient in order that I might protect my mother from harm. I did not know of such order until after intestate's death when I reviewed her medical records. Defendant, Carpenter, was required to exercise the reasonable and ordinary care, skill, and ability ordinarily exercised by other physicians in the same or similar circumstances. Defendant, Carpenter, failed to treat intestate in a skillful, diligent manner and as a result of his negligent treatment intestate became a "no code" patient without her informed consent causing intestate not to be revived as a result of a morphine overdose caused by defendant, Carpenter, and other defendants.

27. On April 13, 1989 during the course of their regular employment at Regional West Medical Center, Nancy Adams, R.N. and Linda

Moreno, R.N. accepted a telephone order from defendant, Carpenter, in regard to a "no code order". Nancy Adams, R.N. and Linda Moreno, R.N. failed to exercise their duties in a skillful diligent manner and as a result they failed to protect their client from the negligent acts of defendant, Carpenter. A reasonable prudent nurse would have followed the wishes of the patient who was of sound mind and capable of making her own medical decisions, would have respected intestate's right to self-determination and would have followed the policies and procedures of Regional West Medical Center and not have accepted the telephone order. A reasonable prudent nurse would have reported this to her superior. As a result of Nurse Adams's and Nurse Moreno's negligent acts, intestate became a "no code patient" against her wishes. Nancy Adams, R.N. and Linda Moreno, R.N. at the time of the tortious act were performing within the scope of their employment duties and therefore their tortious acts are imputable to the Defendant, Regional West Medical Center, under the doctrine of Respondeat Superior. As a result of the negligence of Nurse Adams and Moreno, intestate suffered injuries resulting in death.

28. On April 14, 1989, Defendant, Carpenter, ordered a continuous intravenous infusion of morphine without the intestate's permission or informed consent. Intestate at the time was of sound mind and capable of making her own medical decisions. Intestate had a right to self-determination and defendant, Carpenter, failed to respect that right. Lack of informed consent resulted in proximate injury to intestate. This treatment was contraindicated since it would make intestate's underlying condition (recurrent aspiration pneumonia) worse. The morphine was administered in such a manner in which the doctors and nurses controlled

the doseage without regard to the patient's wishes or pain level representing negligent treatment. Defendant, Carpenter, was required to exercise ordinary and reasonable care, skill, and ability ordinarily exercised by other physicians in the same or similar circumstances. Defendant, Carpenter, failed to perform his professional duties in a skillful diligent manner. Defendant, Carpenter, by due diligence failed to inform me, Glenn R. Waite, M.D., that he had ordered a continuous morphine infusion where the doctors and nurses control the doseage without regard to the intestate's wishes or pain level and where he had given intestate morphine against her expressed wishes. Had defendant, Carpenter, informed me, I could have protected my mother from harm. The negligent acts of defendant, Carpenter, directly resulted in injuries to intestate leading to death.

29. On April 14, 1989, intestate was a victum of tortious conduct perpertrated by Nancy Adams, R.N. while acting within the scope of her employment duties at Regional West Medical Center. Nancy Adams, R.N. was observed to administer a continuous morphine infusion to intestate knowing that intestate had refused the medication. Intestate was of sound mind and capable of making her own medical decisions. Intestate had a right to self-determination and Nurse Adams failed to respect intestate's right. Nancy Adams, R.N. in the course of her employment duties failed to exercise her duties in a skillful diligent manner. At the time of the tortious act, Nancy Adams, R.N. was acting within the scope of her employment duties and therefore her tortious acts are imputable to the defendant, Regional West Medical Center, under the doctrine of Respondeat Superior.

30. On April 15, 1989, defendant, Carpenter, ordered the intestate's enteral

nutrition support to be discontinued and failed to provide intestate with food and adequate water for over two days prior to death. Nutritional support was definitely indicated. This withdrawal of nutritional support was without the intestate's permission or authorization who was competent to make her own decisions. Intestate had a right to self-determination and defendant, Carpenter, failed to respect that right. Lack of informed consent resulted in proximate injury to intestate. Withdrawal of fluid and food made the morphine stay in her body for longer periods of time thus causing toxicity. Defendant, Carpenter, failed to perform his professional duties in a skillful diligent manner. By due diligence, defendant, Carpenter, failed to inform me, Glenn R. Waite, that he had withdrawn all forms of nutritional support from my mother (intestate). Had defendant, Carpenter, informed me, I could have protected my mother from harm. As a direct result of the negligent acts of defendant Carpenter, intestate sustained injuries leading to death.

31. On April 15, 1989, during the course of her employment duties at Regional West Medical Center, Marlene McKeown, R.N. withdrew nutrition and hydration from the intestate without the intestate's informed consent. Intestate was capable of making her own medical decisions. Intestate had a right to self-determination and Nurse McKeown failed to respect that right. Nurse McKeown failed to perform her duties in a skillful manner. As a direct result, intestate became dehydrated and weak from lack of fluids and food. This made the morphine stay in her body for longer periods of time resulting in morphine toxicity. At the time of the tortious act, Marlene McKeown, R.N., was acting within the scope of her employment

duties and therefore her tortious act was imputable to defendant, Regional West Medical Center, under the doctrine of Respondeat Superior.

32. On April 16, 1989 and April 17, 1989, intestate showed signs of morphine overdoseage such as hypotension, sedation and unresponsiveness, and apnea. Intestate was attended by defendants, Carpenter, Himes, O'Holleran, Houck, Rusen, and Bowlin. Each defendant jointly and severaly committed acts of nonfeasance by failing to take appropriate action to treat intestate's signs of morphine overdoseage. Each of the defandants filed to perform their duties in a skillful prudent manner. As a direct and proximate result of each defendant's negligence, intestate sustained injuries leading to death.

33. On April 16, 1989 and April 17, 1989 and at other times pertinent to this action, Jama Houck, R.N., Donna Rusen, R.N., and Judy Bowlin, L.P.N. who committed the tortious acts as described in paragraph 32 above, were each and all employees of defendant, Regional West Medical Center. At the time of these tortious acts, Jama Houck, Donna Rusen and Judy Bowlin were acting within the scope of their employment duties and their tortious acts are therefore imputable to defendant, Regional West Medical Center, under the doctrine of Respondeat Superior.

34. On April 17, 1989, at approximately 2:00 PM, defendant, Carpenter, was observed to mechanically increase the rate of infusion of morphine at the same time intestate was having signs of morphine overdoseage such as hypotension, unresponsivess to verbal and painful stimuli and periods of apnea of greater than 30 seconds. Defendant, Carpenter, knew that intestate was experiencing signs of morphine overdoseage since he had recorded such signs

in the progress notes at 1345 hours (1:45 PM) and discontinued respiratory therapy and antibiotics. This tortious act was a specific deliberate and direct intent to kill the intestate. Defendant, Carpenter, demonstrated gross lack of competency and gross inattention to the intestate's safety and had a mind showing recklessness of social duty, disregard for human life, and hardness of heart. As a direct and proximate result of this tortious act, intestate turned blue, gasping for air, and died a painful death.

35. Donna Rusen, R.N. during the course of her employment duties observed defendant, Carpenter, to mechanically increase the rate of infusion of morphine at the same time the intestate was having signs of morphine overdoaseage. Donna Rusen, R.N. failed to perform her nursing profession in a skillful, diligent and prudent manner by failing to protect intestate from the harmful acts of defendant, Carpenter. This tortious act was a specific direct intent to allow intestate to die. Nurse Rusen had a mind reckless of social duty and disregard for human life. As a proximate and direct result of her nonfeasance, intestate became blue, gasping for air, and died a painful death. Donna Rusen, R.N. failed to perform cardio-pulmonary resusciation and this would have easily corrected the morphine overdoseage. Donna Rusen, R.N. at the time of the tortious act, was an employee of defendant, Regional West Medical Center, and acting within the scope of her employment duties and therefore her tortious act was imputable to the defendant, Regional West Medical Center, under the doctrine of Respondeat Superior.

36. Intestate was not contributorily negligent and had expressed a desire to live and stated she wanted everything possible to be done that could be done to save her life.

The defendants failed to respect her wishes.

37. The defendants demonstrated gross lack of competency, gross inattention and wanton indifference for the safety of the intestate and a reckless disregard for human life.

38. As a direct and proximate result of the above-described negligent acts of the defendants, intestate suffered multiple injuries, which caused her death on April 17, 1989. The defendants are joint tortfeasors and this represents joint and several liability.

39. At the time of her death, intestate had a life expectancy of 13 years, and was 71 years old when she died.

40. By reason of the death of intestate, intestate's surviving son has been deprived of intestate's support, comfort, society, counsel and services. Intestate's estate has been deprived of approximately $50,000, the present value of the accumulations that the intestate would have made to her estate had she lived out her life expectancy.

41. Plaintiff has attached to this petition the affidavit of Colleen E. Nash.

WHEREFORE, Plaintiff prays for a judgment against the defendants for the wrongful death of Harriet I. Waite to be awarded to the next of kin who is the plaintiff himself, individually, as decedent's natural born son and sole heir at law under intestate succession as follows:

1. General damages for pecuniary losses at the maximum allowable sum per statute.

2. Special damages for malicious acts and bad faith. Demand is made for two million dollars.

3. Funeral expenses and grave marker expenses for a sum of approximately $3900.00

4. Costs of this action and such further relief as may be proper.

5. Interest is demanded and is to be

calculated from April 17, 1989 and onward until judgment by this court.

6. Demand is made for a jury to hear this case.

Glenn R. Waite
Plaintiff
1202 West 28th St.
Cheyenne, WY 82001
307-634-8712

VERIFICATION:

STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

Glenn R. Waite , first fully sworn upon oath, deposes and states that he is the duly appointed, qualified, and acting Personal Representative of his deceased mother, Harriet I. Waite, and the sole heir at law under intestate succession. He is the Plaintiff in this action and represents the interests of no other artificial or natural person besides himself. He is the sole legal next of kin of Harriet I. Waite and is the only real party in interest. He prosecutes this lawsuit for his benefit only. He states that he has read the petition and knows the contents and states that the facts therein are true to the best of his knowledge. He is a Board Certified Primary Care Physician and has personally reviewed the medical records of Harriet I. Waite along with other physicians.

Glenn R. Waite

Subscribed and sworn to before me this the 15th day of November 1993.

Notary Public

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he mailed a true and correct copy of the foregoing AMENDED PETITION to the following individuals on this the 15th day of

November 1993 by regular U. S. mail: William M. Lamson, Jr., 10306 Regency Parkway Drive., Omaha, NE 68114; Robert P. Chaloupka, 1904 First Avenue, P.O. Box 1204, Scottsbluff, NE 69361; and James A. Snowden, 1000 NBC Center, Lincoln, NE 68508.

Glenn R. Waite

IN THE COURT OF APPEALS FOR THE STATE OF NEBRASKA

GLENN R. WAITE, PERSONAL REPRESENTATIVE OF HARRIET I. WAITE, Deceased, Plaintiff, v. W. SCOTT CARPENTER, M.D., REGIONAL WEST MEDICAL CENTER, and SCOTTSBLUFF INTERNAL MEDICINE GROUP, Defendants.	)	Case No. A-94-0444 MOTION FOR SUMMARY AFFIRMANCE AND DISMISSAL

COMES NOW, Appellee, Regional West Medical Center, and moves to for summary affirmance and dismissal on the ground that:

1. The questions presented for review are so unsubstantial as not to require argument.

2. This Court's earlier holding in Waite v. Carpenter, 1 NAC 2014 (1992) is dispositive of the Appellant's appeal in this matter.

3. The Appellant is engaged in the unauthorized practice of law.

Dated the 21 day of July, 1994.

REGIONAL WEST MEDICAL CENTER, Defendant

By: KNUDSEN, BERKHEIMER, RICHARDSON & ENDACOTT
1000 NBC Center
Lincoln, Nebraska 68508
(402) 475-7011

By: _____
James A. Snowden-#13927
One of Said Attorneys

IN THE COURT OF APPEALS FOR THE
STATE OF NEBRASKA

GLENN R. WAITE, Personal Representative of HARRIET I. WAITE, Deceased, Plaintiff-Appellant, v. W. SCOTT CARPENTER, M.D., REGIONAL WEST MEDICAL CENTER, and SCOTTSBLUFF INTERNAL MEDICINE GROUP, Defendants-Appellees.	))))))))	Case No. A-94-0444 MOTION FOR SUMMARY AFFIRMANCE AND DISMISSAL

COME NOW Defendants-Appellees W. Scott Carpenter, M.D. and Scottsbluff Internal Medicine Group, and hereby move, pursuant to Rule 7 (B) of the Supreme Court and Court of Appeals' rules, for summary dismissal and affirmance on the grounds that:

1. The questions presented for review are so unsubstantial as not to require argument in that this Court's earlier holding in Waite v. Carpenter, 1 NAC 2014 (1992) is dispositive of Appellant's appeal in this matter.

2. The Appellant is engaged in the unauthorized practice of law.

W. SCOTT CARPENTER, M.D. and
SCOTTSBLUFF INTERNAL MEDICINE
GROUP,
Defendants-Appellees
By: _____

Mark E. Novotny #19102
KENNEDY, HOLLAND, DeLACY &
SVOBODA
10306 Regency Parkway Dr.
Omaha, NE 68114
(402) 397-0203
ATTORNEY FOR DEFENDANTS-
APPELLEES.

IN THE COURT OF APPEALS FOR THE STATE OF NEBRASKA

GLENN R. WAITE, Plaintiff, vs. W. SCOTT CARPENTER, M.D., REGIONAL WEST MEDICAL CENTER, SCOTTS BLUFF INTERNAL MEDICINE GROUP, Defendants.	* * * * * * * * * *	NO. A-94-0444 APPELLANT'S OBJECTION TO MOTION FILED BY APPELLEE

APPELLANT'S OBJECTION OPPOSING MOTION FOR SUMMARY AFFIRMANCE AND DISMISSAL FILED BY APPELLEE REGIONAL WEST MEDICAL CENTER

COMES NOW, Appellant, Glenn R. Waite, pursuant to Rule 7 (B) (4) of the Supreme Court / Court of Appeals Rules and hereby enters his objections to the motion filed by Appellee, Regional West Medical Center. This Appellant opposes the Appellee's motion on the following grounds:

1. Appellee's Motion was filed on or about July 21, 1994 whereas Appellant's brief was filed on July 25, 1994. This does not comply with Rule 7 (B) (2) of the Supreme Court / Court of Appeals Rules which states that Appellee's Motion cannot be filed before Appellant's brief has been filed. Appellee's motion also does not comply with the same rule which states that such a motion shall document the claimed lack of substance of the questions presented by citations to the dispositive portions of the record and to the controlling statutory and case law.

2. This Appellant is not engaged in the unauthorized practice of law. Appellant, Glenn R. Waite, appears individually and is the sole beneficiary and sole distributee of decedent. Appellant represents himself only and is the sole and only real party in interest.

3. In contradiction to the claims of Appellee, all issues raised by Appellant have not been disposed of in the decision of Waite v. Carpenter, 1 NAC 2014 (1992) which was a nonsuit or judgment of dismissal against the personal representative. Issues raised by Plaintiff-Appellant in trial court go to issues of jurisdiction of trial court and are not procedural issues or irregularities. Appellee raises issues of Res Judicata and Collateral Estoppel on appeal which were not raised by the pleadings of Appellee as to form issues in the trial court and are therefore not appropriate on appeal.

4. Appellee states that the questions presented on review are so unsubstantial as to not require argument and reasons that he is entitled to summary affirmance because the same issues were ruled upon by this same court. Appellee does not document the claimed lack of substance of the questions presented by citations to the dispositive portions of the record and to the controlling statutory and case law. Since Defendants-Appellees did not file an affirmative defense to Appellant's motions or petitions to vacate the void judgment of dismissal, the facts pleaded by Plaintiff-Appellant are deemed true and no issues of fact or law arose or were presented to the trial court; Neb. Rev. Stat. section 25-1102 (Reissue 1989). Issues not presented to trial court are not appropriate on appeal. The judgment of trial court is not supported by the allegations of any pleadings before trial court and is therefore prejudicially erroneous.

Appellant supports this objection with a memorandum brief.

WHEREFORE, Appellant respectively requests and prays that this court will deny Appellee's Motion for Summary Affirmance and Dismissal.

Glenn R. Waite
Plaintiff-Appellant
1202 West 28th St.
Cheyennne, WY 82001
307-634-8712

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a true and correct copy of the foregoing OBJECTION to be served upon Mark E. Novotny, 10306 Regency Parkway Dr., Omaha, NE 68114; James A. Snowden, 1000 NBC Center, Lincoln, NE 68508; and Robert P. Chaloupka, 1904 First Ave., P.O. Box 1204, Scottsbluff, NE 69363 by regular U. S. Mail this the 28th day of July 1994.

Glenn R. Waite

IN THE COURT OF APPEALS FOR THE STATE OF NEBRASKA

GLENN R. WAITE, Plaintiff, vs. W. SCOTT CARPENTER, M.D., REGIONAL WEST MEDICAL CENTER, SCOTTS BLUFF INTERNAL MEDICINE GROUP, Defendants.	* * * * * * * * * *	NO. A-94-0444 APPELLANT'S OBJECTION TO MOTION FILED BY APPELLEE

APPELLANT'S OBJECTION OPPOSING MOTION FOR SUMMARY AFFIRMANCE AND DISMISSAL FILED BY APPELLEES W. SCOTT CARPENTER, M.D. AND SCOTTSBLUFF INTERNAL MEDICINE GROUP

COMES NOW, Appellant, Glenn R. Waite, pursuant to Rule 7 (B) (4) of the Supreme Court / Court of Appeals Rules and hereby enters his objections to the motion filed by Appellees, W. Scott Carpenter, M.D. and Scottsbluff Internal Medicine Group. This Appellant opposes the Appellees' motion on the following grounds:

1. Appellees state that the questions presented on review are so unsubstantial as

to not require argument and reasons that they are entitled to summary affirmance and dismissal because the same issues were ruled upon in Waite v. Carpenter, 1 NAC 2014 (1992). This is false since issues raised go to the jurisdiction of trial court which were not previously raised. Appellees do not document the claimed lack of substance of the questions presented (which involve jurisdiction of trial court) by citations to the dispositive portions of the record and to the controlling statutory and case law. Furthermore, a violation by the trial court of Appellant's rights under the fourteenth amendment to the U.S. Constitution is a substantial issue requiring argument in this court.

2. This Appellant is not engaged in the unauthorized practice of law. Appellant, Glenn R. Waite, appears individually and is the sole beneficiary and sole distributee of decedent. Appellant represents himself only and is the sole and only real party in interest in this lawsuit.

3. In contradiction to the claims of Appellees, all issues raised by Appellant have not been disposed of in the decision of Waite v. Carpenter, 1 NAC 2014 (1992) which was a nonsuit or judgment of dismissal against the personal representative. (Supp. T1) Issues raised by Plaintiff- Appellant in trial court go to issues of jurisdiction of trial court. Since Defendants-Appellees did not file an affirmative defense to Appellant's motions or petitions to vacate the void judgment of dismissal, the facts pleaded by Plaintiff- Appellant are deemed true and no issues of fact arose or were presented to the trial court; Neb. Rev. Stat. section 25-1102 (Reissue 1989). Issues not presented to trial court are not appropriate on appeal. The findings and judgment of the trial court (T94) are not supported by the allegations of any

pleadings before trial court and are therefore prejudicially erroneous.

Appellant supports this objection with a memorandum brief.

Glenn R. Waite
Plaintiff-Appellant
1202 West 28th St.
Cheyennne, WY 82001
307-634-8712

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a true and correct copy of the foregoing APPELLANT'S OBJECTION to be served upon James A. Snowden, 1000 NBC Center, Lincoln, NE 68508; Robert P. Chaloupka, 1904 First Ave., P.O. Box 1204, Scottsbluff, NE 69363; and Mark E. Novotny, 10306 Regency Parkway Dr., Omaha, NE 68114 by regular U. S. Mail this the 12th day of August 1994.

Glenn R. Waite

IN THE DISTRICT COURT FOR SCOTTS BLUFF COUNTY, NEBRASKA

GLENN R. WAITE,	*	No. 38267
Plaintiff,	*	No. 38268
vs.	*	No. 38271
W. SCOTT CARPENTER, M.D.,	*	MOTION FOR
et. al.	*	CONTINUANCE
Defendants.	*	

COMES NOW, Plaintiff, Glenn R. Waite, individually, as sole distributee and sole beneficiary of the estate of Harriet I. Waite and moves this court pursuant to section 25-1148 of the Neb. Rev. Stat. (Reissue 1989) for a continuance of this matter for the following reasons:

1) This plaintiff filed in this court an amended motion to vacate judgment of dismissal on or about January 18, 1994 in which he asserted that at least one of the judges who presided in the hearing held

September 3, 1991 had a pecuniary interest in the cause of action and that the judgment of dismissal on September 5, 1991 was void. To his motion he attached a copy of the requests to admit facts served upon the defendant, Regional West Medical Center, on or about November 26, 1993. The defendant did not within thirty days provide a valid answer and therefore the facts are deemed admitted according to Nebraska law. This court at the hearing on February 1, 1994 announced at the hearing that the hearing would not be an evidenciary hearing. There was no prior notice of this. This was a total surprise to this party. This court disallowed this plaintiff to have these facts admitted which is an abuse of discretion. This plaintiff had prepared an affidavit for the hearing which was not allowed as evidence at the hearing since the hearing was not an evidenciary hearing. Since the court announced that no evidence would be admitted at the hearing, this party requested a continuance. The court denied the continuance. This was an abuse of discretion.

2) Plaintiff also states that he was present at the January 7, 1994 hearing in case number 38270 and the Honorable Judge Robert Hippe stated in the hearing that his wife was a past employee of the defendant, Regional West Medical Center.

Plaintiff states that the issue of whether a judgment of dismissal rendered by a disqualified judge is void and whether a judge who rendered the judgment is disqualified is a question of both law and of fact. This requires that the hearing in regard to this issue must be an evidenciary hearing. The amended motion to vacate judgment of dismissal filed on or about Janaury 18, 1994 only dealt with jurisdictional issues. The first two issues are only questions of law. The issue of

jurisdiction of the court by a disqualified judge is a question of both law and fact. Since it is a question of fact there needs to be an evidence hearing.

Plaintiff states that both Judge Hippe and Judge Kortum were present at the September 3, 1991 hearing and arrived at a joint decision to dismiss the cases on September 5, 1991. A question of fact arises as to whether or not Judge Kortum knew of Judge Hippe's disqualification at the time and whether Judge Kortum was influenced by Judge Hippe's interests at the time the judgment of dismissal was entered on the court records.

Plaintiff states that Nebraska law prohibits him from calling Judge Kortum as a witness in his own case and that if Judge Kortum continues to preside in this case, it would be impossible for this party to prove whether Judge Kortum knew of the Judge Hippe's disqualification and whether he was influenced by Judge Hippe's interests in this case. See Neb. Rev. Stat. 27-605.

Therefore, plaintiff requests that the court assign the case to another judge other than Judge Kortum or Judge Hippe who can render an impartial decision in this matter regarding continuance and regarding Judge Hippe's disqualification. Plaintiff requests that Judge Kortum cease and desist from taking any further action or hearings in this matter other than ministerial duties until the court has made a determination in regard to this motion for continuance and in regard to whether the judgment of dismissal dated September 5, 1991 is void due to the judge's disqualification.

Plaintiff states that the court has the inherent power to vacate a void judgment and that lapse of time is not a bar to the bringing a motion to vacate a void judgment.

Plaintiff has attached to this motion his own affidavit dated February 8, 1994.

Plaintiff states that he has a meritorious cause of action against the defendants and that he was prevented from obtaining a fair and just trial on September 3, 1991 by virtue of Judge Hippe's personal interests in this case.

Plaintiff has attached a brief to this motion.

WHEREFORE, Plaintiff, Glenn R. Waite, prays that this court will grant him a continuance in order that he might prove Judge Hippe's disqualification. Plaintiff also prays that the court will grant him costs and other expenses as a result of this motion. Plaintiff prays that the court will set a time and place for hearing and will assign this matter to a judge who can render an impartial adjudication.

_____

Glenn R. Waite
Plaintiff
1202 West 28th St.
Cheyenne, WY 82001
307-634-8712

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he mailed a true and correct copy of the foregoing MOTION FOR CONTINUANCE upon Mark E. Novotny, 10306 Regency Parkway Dr., Omaha, NE 68114; James A. Snowden, 1000 NBC Center, Lincoln, NE 68508; and Robert P. Chaloupka, 1904 First Ave., P.O. Box 1204, Scottsbluff, NE 69363 by regular U.S. mail, postage prepaid, on this the 9th day of February 1994.

_____

Glenn R. Waite

IN THE DISTRICT COURT FOR SCOTTS BLUFF COUNTY, NEBRASKA

GLENN R. WAITE, Plaintiff,	*	No. 38267
	*	No. 38268
vs.	*	No. 38271
W. SCOTT CARPENTER, M.D., et. al., Defendants.	*	AFFIDAVIT OF GLENN R. WAITE

STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

Glenn R. Waite, being first duly sworn upon his oath, makes this affidavit based on personal knowledge and deposes and states:

1) Affiant was personally present at the January 7, 1994 hearing in case number 38270 held at the Scotts Bluff County Courthouse. At that hearing, affiant heard the Honorable Judge Robert Hippe state that his wife, Ann Hippe, was a past employee of the defendant, Regional West Medical Center.

2) Affaint states that the Honorable Judge Alfred Kortum presided at the February 1, 1994 hearing in this case and that he announced at the hearing that it would not be an evidence hearing. This prevented this party from admitting evidence that would tend to prove that the Honorable Robert O. Hippe was disqualified to act as judge at the September 3, 1991 hearing. Admitting this evidence would have supported his motion he filed on or about January 18, 1994 to vacate the summary judgment of dismissal dated September 5, 1991.

3) Affiant states that he did not know in September 1991 that Judge Hippe's wife was a present or past employee of defendant, Regional West Medical Center. Affiant further states that he has never during the pendency of this case been a resident of Scotts Bluff County, Nebraska and that by

not living in this area he had no knowledge of the past or present employment of Ann Hippe, wife of Judge Robert Hippe.

4) Affiant states that in case numbers 38267, 38268, 38269, 38270, and 38271 there was not at any time a written waiver of disqualification of judges filed in these cases.

AFFIANT FURTHER SAYETH NOT.

Glenn R. Waite

Subscribed and sworn to before me this the 8th day of February 1994.

seal

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

GLENN R. WAITE, Plaintiff,	)	4:CV94-365
vs.	)	
ROBERT O. HIPPE, JAMES A. SNOWDEN, et .al. Defendants.	)	MEMORANDUM AND ORDER

Page 15:

(d) Hippe's Wife was employed by Snowden's Client [Regional West Medical Center].

DATED this 26th day of June 1995.

BY THE COURT.

Richard G. Kopf
United States
District Judge

UNITED STATES COURT OF APPEALS
for the eighth circuit
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101
Michael E. Gans
Clerk of Court
Telephone
(314) 539-3600

August 24, 1995

Mr. Glenn R. Waite
Apartment #2
1202 W. 28th Street
Cheyenne, WY 82001

Re: 95-3121NEL Glenn R. Waite vs. Robert O. Hippe, et. al.

Dear Mr. Waite:

We have received certified copies of the notice of appeal and docket entries from the Clerk of the United States District Court in the referenced case, together with notification of payment of the $100 docket fee. In accordance with the Federal Rules of Appellate Procedure and the Eighth Circuit Rules, this appeal has today been assigned the docket number indicated.

Enclosed is a copy of an order entered today regarding the record on appeal and briefing schedule.

Sincerely,

Michael E. Gans
Clerk of Court

Supreme Court, U.S.
FILED
DEC 19 1995
CLERK

No. 95-798

In The

Supreme Court of the United States

October Term 1995

GLENN R. WAITE,
Personal Representative of the Estate of
Harriet I. Waite, deceased,

Petitioner,

v.

W. SCOTT CARPENTER, M.D., et al.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Nebraska
And The Court Of Appeals Of The State Of Nebraska

BRIEF OF RESPONDENTS W. SCOTT CARPENTER, M.D., SCOTTSBLUFF INTERNAL MEDICINE GROUP, ARMANDO J. MANGANA, M.D., WILLIAM M. PACKARD, M.D., TERRY MARK HIMES, D.O. AND LARRY O'HOLLERAN, M.D. IN OPPOSITION

MARK E. NOVOTNY
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Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Respondents restate the Questions Presented as follows:

Has Petitioner, Glenn R. Waite, Personal Representative for the Estate of Harriet I. Waite, deceased, raised a federal question in the underlying proceedings in the Nebraska court system so as to grant this Court jurisdiction pursuant to 28 U.S.C. § 1257 or 28 U.S.C. § 1651?

LIST OF PARTIES

Petitioner's list of parties to the proceedings is acceptable with the exception that the Petitioner in the underlying proceedings was "Glenn R. Waite, Personal Representative for the Estate of Harriet I. Waite, deceased" and *not* "Glenn R. Waite" as denominated in Petitioner's Petition for Writ of Certiorari [App. of Petitioner 22, 25-32, 76, 77].

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TO THE HONORABLE SUPREME COURT:

Respondents, W. Scott Carpenter, M.D., Scottsbluff Internal Medicine Group, Armando J. Mangana, M.D., William M. Packard, M.D., Terry Mark Himes, D.O. and Larry O'Holleran, M.D., respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, Glenn R. Waite, Personal Representative of the Estate of Harriet I. Waite, deceased.

OPINIONS BELOW

The two subject opinions of the Nebraska Court of Appeals, appearing at pps. 22-25 (*Waite II*) and 32-45 (*Waite I*) of Petitioner's appendix, respectively, are cited as follows:

Waite v. Carpenter, 3 Neb. App. 879, 533 N.W.2d 917 (Neb. App. 1995) (*Waite II*); and

Waite v. Carpenter, 1 Neb. App. 321, 496 N.W.2d 1 (Neb. App. 1992) (*Waite I*).

STATEMENT OF JURISDICTION

Petitioner seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1257 and 28 U.S.C. § 1651. It is important to note that 28 U.S.C. § 1651 is not a jurisdictional statute, but instead is a procedural statute dealing with writs. Section 1651 does not effect the jurisdiction of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257 provides, in part, as follows:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

Respondents would defer to the well-written and concise summaries of the case as memorialized by the Nebraska Court of Appeals as found in its opinions cited above and found in the appendix of Petitioner as pps. 22-25 (*Waite II*) and 32-45 (*Waite I*).

SUMMARY OF THE ARGUMENT

Petitioner does not raise sufficient grounds under 28 U.S.C. § 1257 for seeking review by the United States Supreme Court of the decisions of the Supreme Court of

the State of Nebraska and the Court of Appeals of the State of Nebraska in this matter. Petitioner is thereby precluded from raising these issues at this late date. Because of Petitioner's failure to raise a federal question below, this Court lacks jurisdiction to accept Petitioner's Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. PETITIONER HAS FAILED TO RAISE A FEDERAL QUESTION FOR REVIEW BY THIS COURT.

The jurisdiction of the United States Supreme Court to review a state court decision under 28 U.S.C. § 1257 is dependent upon the presence of a federal question in the case. *St. Louis M.I. and S.R. Co. v. Taylor*, 210 U.S. 281 (1908). The reason for the federal question requirement is that the United States Supreme Court is not a court of general jurisdiction which can correct any error in state court proceedings; its powers are limited to correcting denials of federal rights in specific instances. *Warters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909).

In order to obtain review of a state court decision in the United States Supreme Court, pursuant to 28 U.S.C. § 1257, it must affirmatively appear from the record as a whole, either expressly or by clear implication, that the federal claim was adequately presented to the state court and was passed upon by that court. *Webb v. Webb*, 451 U.S. 493, 68 L.Ed.2d 392 (1981); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 95 L.Ed.2d 474 (1987). Accordingly, when reviewing state court decisions, the United States Supreme Court will not

decide federal claims that were not pressed or passed upon below. *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527 (1983); *Heath v. Alabama*, 474 U.S. 82, 88 L.Ed.2d 387 (1985); *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 100 L.Ed.2d 62 (1988). Moreover, if nothing in the record indicates that a federal question was presented to the state court, the United States Supreme Court will not take judicial notice that a federal question might have been involved in the case. *Yazoo and M.R. Company v. Adams*, 180 U.S. 481, 45 L.Ed.2d 415 (1901).

Although Petitioner goes to great lengths in his Petition to explain how he believes the Nebraska courts violated his federal rights, the appendix submitted by Petitioner is all but silent in citing underlying pleadings or opinions indicating that Petitioner raised these federal questions in the state court proceedings below. The *only* reference in any of the documents submitted or filed by Petitioner in the state court matters included in Petitioner's appendix even remotely raising an arguable federal question is Petitioner's Objection to Respondents' Motion for Summary Affirmance [App. of Petitioner 81]. It is important to note that Petitioner was raising this argument in response to Respondents' request that the Nebraska Court of Appeal summarily affirm *Waite II* in view of its opinion from *Waite I* [App. of Petitioner 77]. That request by Respondents was overruled [App. of Petitioner 28-31] and, consequently, any "violation . . . of [Petitioner's] rights" under federal law in regards to this narrow issue of summary affirmance was decided in Petitioner's favor.

Secondly, if the Court will note Petitioner's statement of the case at page 9 of Petitioner's Petition for Writ of

Certiorari, Petitioner himself indicates that he did not directly raise a federal question in the state court proceedings; likewise Petitioner therein admits that the only reference to a possible federal question raised by Petitioner can solely be found in Petitioner's appendix at page 81 (discussed in the preceding paragraph by Respondents).

Clearly Petitioner did not raise any federal questions to the Nebraska state courts. Likewise, the record as submitted by Petitioner is woefully lacking in documented proof of Petitioner arguably raising a federal issue below. Petitioner's bare bones statements citing to his briefs are insufficient to show that Petitioner adequately preserved his rights to access this Court. In fact, the most important piece of evidence indicating that Petitioner *did not* attempt to raise any federal questions in the most recent of the Nebraska Court of Appeals decisions (*Waite II*) is Petitioner's Issues on Appeal filed in conjunction with Petitioner's second appeal (*Waite II*) [App. of Respondents 1-3]. Clearly the issues raised for the second appeal by Petitioner to the Nebraska Court of Appeals do not in any way, shape or form contemplate a federal question for review.

There are powerful policy considerations underlying the requirement that the federal question be first presented to and ruled on by the state courts. *Webb v. Webb*, 451 U.S. 493, 68 L.Ed.2d 392 (1981). These policies are first, comity to the states, and second, a host of practical considerations, chief among which is the United States Supreme Court's need for a properly developed record on appeal. *Webb v. Webb*, 451 U.S. 493, 68 L.Ed.2d 392 (1981); *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 100

L.Ed.2d 62 (1988). Clearly there is no record on appeal, let alone one presented to this Court, that would support Petitioner's contention that he properly raised a federal question in the state court proceedings.

Because the United States Supreme Court will not decide federal claims that were not pressed or passed upon below, it is essential that a federal question be brought to the attention of the state court hearing the case. *Green Bay and Mississippi Canal Co. v. Patten Paper Co.*, 172 U.S. 58, 43 L.Ed. 364, rehearing denied, 173 U.S. 179, 43 L.Ed. 658 (1898). The record filed with the United States Supreme Court must show that the federal questions were raised in the state courts. *Live Oak Water Users' Association v. Railroad Commission of California*, 264 U.S. 354, 70 L.Ed. 305 (1926); *Whitney v. California*, 274 U.S. 357, 71 L.Ed. 1095 (1927); *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 100 L.Ed.2d 62 (1988). Petitioner has not complied with this requirement.

As far as federal law is concerned, it is not important how the federal question was raised in the state court, as long as it appears that such question was actually considered and decided by the state court. *Manhattan Life Insurance Co. v. Cohen*, 234 U.S. 123, 58 L.Ed. 1254 (1914); *Cissna v. Tennessee*, 246 U.S. 289, 62 L.Ed. 720 (1918); *Cohen v. Cowles Media Co.*, 501 U.S. ___, 115 L.Ed.2d 586 (1991). There is nothing in *Waite I* nor in *Waite II* which would indicate that the state courts of Nebraska considered or decided any federal questions pertaining to Petitioner. In fact, as noted above, Petitioner's own pleading summarizing the issues on appeal to the Nebraska Court of Appeals in *Waite II* clearly does not ask the state court to address any federal issues [App. of Respondents 1-3].

A party to a state court action may not preserve a federal constitutional challenge for review by United States Supreme Court by generally invoking the Constitution in state court and awaiting review in the United States Supreme Court to specify the constitutional provision it is relying upon. *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71 100 L.Ed.2d 62 (1988). In order to colorably raise a cognizable claim under a federal statute or the federal constitution for review, at a minimum there should be no doubt from the record that a claim under a federal statute or the federal constitution was presented in a state court and that the state court was apprised of the nature or substance of the federal claim at the time and in the manner required by state law. *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71 100 L.Ed.2d 62 (1988).

It is not sufficient that a right under a specified provision of the Constitution is merely alleged in a pleading, if the federal question is not sufficiently real or substantial, or if the state court did not pass on the federal question presented in the pleading. *Sawyer v. Piper*, 189 U.S. 154, 47 L.Ed. 757 (1903); *Seaboard A.L. Railway v. Padgett*, 236 U.S. 668, 59 L.Ed 777 (1915); *Bowe v. Scott*, 233 U.S. 658, 58 L.Ed. 1141 (1915); *St. Louis and S.F.R. Co. v. Shepherd*, 240 U.S. 240, 60 L.Ed. 622 (1916). Furthermore, while the federal question need not be presented to a state court in any particular form, the United States Supreme Court is not required to review a case coming from a state court if the federal issues were not presented with sufficient clarity or definiteness to permit effective adjudication in the United States Supreme Court. *Socialists Labor Party v. Gilligan*, 406 U.S. 583, 32

L.Ed.2d 317 (1972); *Herndon v. Georgia*, 295 U.S. 441, 79 L.Ed. 1530 (1935).

As noted above, Petitioner makes much argument that he raised federal question issues in state court briefs. However, no such briefs have been included by Petitioner in his appendix to this Court. A contention that a federal question was raised in the state court cannot be sustained by reference to briefs and statements which are not part of the record transmitted to the United States Supreme Court. *Lynch v. New York*, 293 U.S. 52, 79 L.Ed. 191 (1934).

In order for a state court case to be reviewed by the United States Supreme Court, it must appear from the record that a federal question was decided by the state court, or that the judgment rendered could not have been given without deciding the federal question. *Harding v. Illinois*, 196 U.S. 78, 49 L.Ed. 394 (1904); *First National Bank of Esterville*, 215 U.S. 241, 54 L.Ed. 223 (1910). It is not sufficient that a federal question was raised or might have been decided by a state court. *Kansas Endowment Association v. Kansas*, 12 U.S. 103, 30 L.Ed. 593 (1987); the record must show expressly, *Id.* at ___, or by necessary implication, *Sayward v. Denny*, 158 U.S. 180, 39 L.Ed. 941 (1895); that a federal question was actually decided by the state courts adversely to the appellant or petitioner in the United States Supreme Court. Again, simply these requirements are clearly lacking here.

Merely for the sake of argument, even if Petitioner had raised a federal question below, the two underlying decisions found at *Waite I* and *Waite II* are based on sound state law that has no bearing on any federal issue. The United States Supreme Court has long held that it

will not consider an issue of federal law on direct review from a judgment of a state court if the state court's judgment rests on a state law ground that is both independent of the merits of the federal claim and an adequate basis for the court's decision. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 89 L.Ed. 2092 (1945); *Smith v. Smith*, 366 U.S. 210, 6 L.Ed.2d 233 (1961); *Bell v. Marland*, 378 U.S. 226, 12 L.Ed.2d 822 (1964); *Michigan v. Long*, 463 U.S. 1032, 77 L.Ed.2d 1201 (1983).

Where a state court's decision rests upon an adequate and independent state ground, the state ground controls the result of the case, no matter what the Supreme Court may say about the merits of the federal issue. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 53 L.Ed.2d 965 (1977). In such a case, anything which the United States Supreme Court could say on the federal issue would merely be an advisory opinion and the United States Supreme Court has stated that it does not have jurisdiction to render an advisory opinion under such circumstances, or to correct statements in the state court's opinions which do not affect the final outcome of the case, even though the state court's opinion may reflect an erroneous view of the federal law. *Herb v. Pitcairn*, 324 U.S. 117, 89 L.Ed 789 (1945); *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100, 38 L.Ed 298 (1973); *Black v. Cutter Laboratories*, 351 U.S. 292, 100 L.Ed 1188 (1956); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 89 L.Ed. 2092 (1945). Accordingly, a writ of certiorari to review a state court decision will generally be dismissed and improvidently granted where the state court judgment rests on an adequate and independent state ground. *Zacchini v.*

Scripps-Howard Broadcasting Co., 433 U.S. 562, 53 L.Ed.2d 965 (1977).

II. RESPONDENTS OBJECT TO THE QUESTIONS RAISED BY PETITIONER IN SUPPORT OF HIS PETITION FOR WRIT OF CERTIORARI.

Pursuant to Rule 15.2 of the Rules of the Supreme Court of the United States, in addition to objecting to this Court's jurisdiction to accept Petitioner's request for certiorari due to Petitioner's failure to properly raise and preserve for review a federal question in the underlying state court proceedings, Respondents, so as to not waive any other objections to the Petition for Writ of Certiorari, hereby object to the questions presented by Petitioner in his Petition for Writ of Certiorari.

CONCLUSION

Respondents, W. Scott Carpenter, M.D., Scottsbluff Internal Medicine Group, Armando J. Mangana, M.D., William M. Packard, M.D., Terry Mark Himes, D.O. and Larry O'Holleran, M.D., pray that this Court deny Petitioner's Writ of Certiorari because the case presents no federal question for this Court to review and because the lower court's holdings were not in error.

Respectfully submitted,

MARK E. NOVOTNY
DAVID J. SCHMITT
KENNEDY, HOLLAND, DELACY & SVOBODA
10306 Regency Parkway Drive
Omaha, NE 68114
(402) 397-0203
Attorneys for Respondents

APPENDIX A

IN THE DISTRICT COURT OF SCOTTS BLUFF COUNTY, NEBRASKA

GLENN R. WAITE, Plaintiff, vs. W. SCOTT CARPENTER, M.D., REGIONAL WEST MEDICAL CENTER, SCOTTSBLUFF INTERNAL MEDICINE GROUP, Defendants.	)	NO. 38267 ISSUES ON APPEAL

COMES NOW, Plaintiff, Glenn R. Waite, individually, as the sole distributee and sole beneficiary of the estate of Harriet I. Waite pursuant to Rule 5(A)(2) of the Supreme Court / Court of Appeals Rules and provides a statement of issues which this appellant intends to present on appeal. The issues to be presented on appeal are as follows:

1. Nebraska law does not confer jurisdiction upon the trial judge to hold a hearing in chambers on the plaintiff's motion to vacate judgment or motion for new trial. Subject matter jurisdiction cannot be conferred upon judge by consent.

2. It was an abuse of discretion on the part of the trial court to first make a decision on his motion to vacate judgment or motion for new trial and not first decide on his motion for change of Judge or Venue.

3. It was an error for the trial court to hold that all matters raised by the various motions of the plaintiff

could have and should have been raised in the appeal taken to the Nebraska Court of Appeals.

4. It was an abuse of discretion on the part of the trial court to prevent the plaintiff from presenting evidence or his theory of defense and deny him a continuance in the matters presented in his motions to vacate a void judgment.

5. The issue of the alleged unauthorized practice of law by a personal representative of a decedent's estate presented by a motion for summary judgment presents a factual issue as to whether the representative is acting in a representative capacity. The factual issue goes to the status of the decedent's estate as to who the heirs are and how the estate will be distributed. During the time the probate court is administering the decedent's estate, the district court is not in possession of the decedent's estate and has no subject-matter jurisdiction to determine the status of the decedent's estate. Personal Representative who represents himself as the sole beneficiary is not acting in a representative capacity. Sole distributee may represent himself when estate descends to him, individually. Lawsuit dismissed against administrator is not a bar to sole distributee prosecuting lawsuit on same cause of action.

6. A judgment decided or rendered by a disqualified judge is absolutely void due to lack of subject-matter jurisdiction. Under Nebraska law there is no

implied waiver to the jurisdiction of the disqualified judge.

Glenn R. Waite
Plaintiff
1202 West 28th Street
Cheyenne, WY 82001
307-634-8712

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a true and correct copy of the foregoing ISSUES ON APPEAL to be served upon James A. Snowden, 1000 NBC Center, Lincoln, NE 68508; and Mark E. Novotny, 10306 Regency Parkway Dr., Omaha, NE 68114 by regular U. S. Mail this the 2nd day of May 1994.

Glenn R. Waite

Supreme Court, U.S.
FILED
DEC 29 1995
CLERK

(3)

Docket No. 95-798

IN THE SUPREME COURT OF
THE UNITED STATES

October 1995 term

GLENN R. WAITE,

Petitioner,

vs.

W. SCOTT CARPENTER, M.D.,

Et. Al.,

Respondents.

On Petition For Writ Of Certiorari
To The Nebraska Supreme Court and
The Nebraska Court of Appeals

PETITIONER'S REPLY BRIEF

Glenn R. Waite,
1202 West 28th St.
Cheyenne, WY 82001
307-634-8712
Petitioner

Questions Presented

Petitioner rejects the Respondents restatement of the Questions presented since this Court always determines whether it has jurisdiction. The Questions presented are:

(1) May the Nebraska Courts refuse to determine the federal question of whether the trial court violated the rights of Glenn R. Waite, under the 14th amendment to the U.S. Constitution, by claiming that the trial court, under the law of the case doctrine, lacked jurisdiction to consider his motions when the federal question was presented for the first time on this appeal?

(2) Can the Nebraska Courts deny Glenn R. Waite, a resident of Wyoming, his constitutional rights under Article IV, section 2, clause 1, and Amendments 1 and 14 of the U.S. Constitution by holding that the trial court,under law-of-the-case doctrine, lacked jurisdiction to consider his motions to vacate a judgment of dismissal alleged to be void because a disqualified judge heard arguments at the hearing which lead to dismissal and the court failed to bring all indispensable parties into court when the Nebraska courts allow its own residents the privilege of vacating a void judgment at any time (even after decision is affirmed on appeal) and the privilege of admitting newly discovered evidence as if no appeal had been taken and the privilege of having all indispensable parties whose rights will be affected brought into court before a final decision is rendered?

(3) Did the Nebraska trial court violate the rights of Glenn R. Waite, under the 14th amendment to the U.S. Constitution, on September 3, 1991, when the court provided him with a disqualified judge and, on April 11, 1994, when the court had not disposed of a Motion for Continuance and Motion for Change of Judge and had not provided him with an opportunity to show why the judge should recuse himself?

List of All Parties

The Respondents state [Brief Opp. ii] that the petitioner's list of parties is acceptable with the exception that the Petitioner in the underlying proceedings was "Glenn R. Waite, Personal Representative for the Estate of Harriet I. Waite, deceased" not "Glenn R. Waite" as denominated in Petitioner's Petition for Writ of Certiorari". However,"Glenn R. Waite" is the only real party in interest in the cases.

It was "Glenn R. Waite" who filed the original cases on April 8, 1995 in the name of "Glenn R. Waite, Personal Representative of Harriet I. Waite, deceased". On or About August 7, 1991, the Respondents filed a motion for summary judgment against "Glenn R. Waite, Personal Representative of Harriet I. Waite, deceased", not against "Glenn R. Waite". Thereafter, one of the Personal Representative's attorneys entered a general appearance and appeared at the September 3, 1991 hearing. The judgment was only against the personal representative and another of his attorneys prosecuted the first appeal [App. of Pet. 32] and represented only the personal representative interests. Then, it was "Glenn R. Waite" who prosecuted the second appeal [Reply Brief App. 1].

"Glenn R. Waite, Personal Representative of Harriet I. Waite, deceased" represents the beneficial interests of "Glenn R. Waite" in the estate because he the sole distributee [App. of Reply Brief 2-4]. A personal representative of a decedent only represents the benefical interests of the successors to the estate assets and the rights of the decedent, but he cannot represent the individual constitutional rights and property rights of the heirs. Therefore, "Glenn R. Waite" is an indispensable party in this proceeding in order to represent his own federal rights.

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To the Honorable Supreme Court:

Petitioner, Glenn R. Waite, most respectively requests that this Court grant his Petition for Writ of Certiorari to the Nebraska Court of Appeals because (1) Petitioner set up and claimed a title, right, privilege or immunity under the U.S. Constitution, (2) the Nebraska Court of Appeals decided the federal claims against the petitioner, and (3) the decision of the Nebraska Court of Appeals does not rest on independent and adequate state grounds.

OPINIONS BELOW

The Respondents [Brief Opp. 1] fail to cite the opinion of the Nebraska Probate Court which is in the Petition [Pet. 6 and 49-58]. Apparently, the Respondents do not want this Court to recognize the individual rights of Petitioner as heir of decedent.

Rule 14.1 of the New Rules of the Supreme Court of the United States (161 F.R.D. 483 at 492 (1995) states that the Petition must include "orders entered in the case by courts or admininstrative agencies". This would include any orders by the Nebraska Probate Court.

SUMMARY OF THE REBUTTAL ARGUMENT

Respondents do concede that Petitioner raised a title, right, privilege or immunity under the U.S. Constitution in the Petitioner's Objection to Respondents' Motion for Summary Affirmance [Brief Opp. 4], but Respondents fail to recognize that (1) the Nebraska Court of Appeals decided the federal claims against the petitioner, and (2) the decision of the Nebraska Court of Appeals does not rest on independent and adequate state grounds. This Court has jurisdiction to hear the petition.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

There are three reasons why this Court should grant the Petition for Writ of Certiorari to the Nebraska Court of Appeals: (1) Petitioner set up and claimed a title, right, privilege or immunity under the U.S. Constitution, (2) The Nebraska Court of Appeals decided the federal claims against the petitioner, and (3) the decision of the Nebraska Court of Appeals does not rest on independent and adequate state grounds.

I. Respondents concede that Petitioner raised a federal question in his objection to the Respondents' motion for summary affirmance, but fail to point out that their Motion for Dismissal & Affirmance and Memorandum Brief for the first time raised the "law-of-the-case doctrine" issue which addressed Petitioner's rights under Art. IV, sec 2, cl. 1 and amendments 1 and 14 of the U.S. Constitution.

The Respondents, W. Scott Carpenter, M.D. et. al., in their Memorandum Brief in Support of Motion for Summary Dismissal and Affirmance argue that Section I of Appellant's Brief raises only issues that should have been raised in the previous appeal. That Memorandum Brief states:

> "Clearly these issues are issues that should have been raised, and could have been raised, and probably were raised, by Appellant in his previous appeal and fully adjudicated by this court in its previous opinion. As such, this court's previous opinion and the Nebraska Supreme Court's overruling of appellant's Petition for Review becomes the law of the case and Appellant is bound by those decisions."

In opposition to this argument by Respondents, the Petitioner, referring to

Section I of his Appellant Brief which claimed a federal right ("Plaintiff has a right of access to the courts protected by Art. I sec 13 of the Nebraska Constitution and Art. 4, sec. 2, cl. 1 and amendments 1 and 14 of the U.S. Constitution." [Petition 9]), argued that the federal claim was a new fact issue not disposed by the previous appeal and stated the following to support his federal claim:

> "THE TRIAL COURT'S VIOLATION OF THE RIGHTS OF GLENN R. WAITE UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS A SUBSTANTIAL QUESTION FOR REVIEW IN THIS APPELLATE COURT. In cooperation with the Appellees, the trial court as a judicial branch of the State of Nebraska has twice violated my rights under the fourteenth amendment to the United States Constitution which states:
>
> > "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."
>
> The trial court has twice deprived me of life, liberty, or property, without due process of law. First, in the trial court on September 3, 1991 when a disqualifed judge participated in the hearing and Second, when the Honorable Judge Kortum presided in the hearing on plaintiff's motion for new trial when a motion and affidavit of disqualification appeared in the court records and was not disposed of prior to the hearing. An application for a

change of judge is timely if made upon the disqualifying facts, even though this is beyond the time normally allowed for the application; Harrington v. Hayes County, 81 Neb.231,115 N.W.773(1908),73ALR2d 1286.

A chose in action is property of intestate which devolves by statute of descent upon the next of kin instantly at death. Neb. Rev. Stat. section 30-2401 (Reissue 1989). Property acquired by statutory entitlement is protected by the fourteenth amendment; Fuentes v. Shevin, 407 U.S. 67, 32 L Ed 2d 556, 92 S Ct 1983 (1972). Where the judicial branch of the State of Nebraska holds a hearing on Appellees' motion for summary judgment raising the issue of unauthorized practice of law of the personal representative, it goes to matters of the personal representative's good name, reputation, honor, or integrity. The requirements of procedural due process are applicable where a state attaches a badge of infamy to a citizen. The due process clause forbids a State from depriving a person of his liberty without due process of law; Wisconsin v. Constantineau, 400 U.S. 433, 27 L Ed 2d 515, 91 S Ct. 507 (1971) and Goss v. Lopez, 419 U.S. 565, 42 L Ed 2d 725, 95 S Ct 729 (1975). The indispensible elements of due process are tribunal with jurisdiction, notice of hearing to the proper party, and an opportunity for a fair hearing according to applicable principles; "Due process of law" implies the right of the person affected to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, to be heard by testimony or otherwise and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved; Watkins v. Dodson, 159 Neb. 745, 68 N.W.2d 508

(1955). On pages 30 through 34 of Appellant's brief, Appellant discusses his right to be heard by testimony or otherwise, and how trial court abused this process.

A fair trial, as required by due process, requires not only an absence of actual bias on the part of the judge, but also that no man be a judge in his own case or try cases where he has an interest in the outcome; Tumey v. Ohio, 273 U.S. 509, 71 L Ed 749 (1926); Re Murchison, 349 U.S. 133, 99 L Ed 942, 75 S Ct 623 (1954); Johnson v. Mississippi, 403 U.S. 212, 29 L Ed 2d 423, 91 S Ct 1778 (1971); and Ward v. Monroeville, 409 U.S. 57, 34 L Ed 2d 267, 93 S Ct 80 (1972). The unfair trial cannot be corrected upon appeal. See Ward v. Monroeville, supra. A financial interest of a court in its decision constitutes that an unfair and partial tribunal within the prohibition of the 14th Amendment; Tumey v. Ohio, supra. In Tumey v. Ohio, supra, the court stated:

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law."

Where the trial court denies a litigant's request for a hearing on the merits and for an opportunity to show why a judge should recuse himself, it violates due process under the 14th amendment; Johnson v. Mississippi, supra. Even if a litgant failed to move under a state statute for the disqualification of a judge to sit, he may urge in the U.S. Supreme Court that his trial before the judge violated his 14th amendement rights; Ward v. Monroeville, supra."

It is quite clear that Petitioner set up and claimed a right under the U. S. Constitution in both his Appellant brief and in his objection and memorandum brief in opposition to the Respondents' Motion for Dismissal & Summary Affirmance.

II. Respondents claim that any federal question raised by the Petitioner was not decided adversly to the Petitioner because the Court of Appeals overruled the Respondents' Motion for Summary Affirmance. However, the Respondents fail to point out that the Court of Appeals did in fact decide the "law-of-the-case doctrine" issue (which was a central issue raised in the Respondents' Motion for Dismissal & Summary Affirmance) adversly to the Petitioner by finally holding that, under the law-of-the-case doctrine, trial court lacked jurisdiction to consider plaintiff's motion.

Respondents state [Brief Opp. 8] that the requirements that the federal question was actually decided adversly to Petitioner are clearly not met.

Respondents are correct that the Court of Appeals overruled their motion for summary affirmance. However, Respondents fail to point out from the record that the Court of Appeals did in fact rule adversly to Petitioner on the law of the case doctrine issue [App. of Pet. 22-25]. This issue involved a federal question which was raised in the Respondents' Memorandum Brief in support of their Motion for Summary Affirmance and in Petitioner's Objection and Memorandum Brief in Opposition to Respondents' Motion as set forth previously. The law of the case doctrine does not apply where the issues are different and the parties are acting in different capacities; System Meat Co. v. Stewart, 190 Neb. 682, 211 N.W.2d 902 (1973). Petitioner has

clearly shown that the issue in Waite II is whether the trial court's judgment in Waite I is a valid judgment and the issue turns on a federal question, whereas, in Waite I, the issue was whether the pleadings were a nullity and the validity of the judgment was not raised or decided in Waite I. However, in Waite II, the Court of Appeals decided the validity of the first judgment which decision turned on a federal question and used a local rule or procedure to defeat federal jurisdiction. In Chicago B. & Q Ry. Co. v. Illinois, 200 US 561, 50 L Ed 596, 26 S Ct 341 (1906), the court held that failure to recognize a federal right or immunity, and the decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied.

It is quite clear that the federal questions raised by the Petitioner were necessary to the state court's determination of the law of the case doctrine issue and were decided adversly to Petitioner by the Nebraska Court of Appeals.

III. Respondents simply state that even if Petitioner had raised a federal question below, the two underlying decisions found at Waite I and Waite II are based on sound state law that has no bearing on any federal issue. However, Respondents fail to cite any state cases to support the fact that the decision in fact rests on an adequate and independent state substantive ground.

Respondents merely state [Brief Opp. 8-9] that the decisions in Waite I and Waite II are based on sound state law without citing any state cases to support their position and without examining the decisions in substance to see if the decisions do in fact rest on independent and adequate state

substantive grounds. This Supreme Court rejects any claims that an adequate state ground exists where no state cases are cited in support of this proposition; Wardius v. Oregon, 412 US 470, 37 L Ed2d 82, 93 S Ct 2208 (1973). The Supreme Court has an independent obligation to ascertain whether an asserted non-federal ground independently and adequately supports the judgment of a state court and has a fair or substantial basis; Howlett v. Rose, 496 U.S., 110 L Ed 2d 332, 110 S Ct 2430 (1990). Where a federal ground being present, it is incumbent upon the Supreme Court of the United States, when it is urged that the decision of a state court rests upon a state ground, to ascertain for itself, in order that constitutional guarantees may appropriately be enforced, whether the asserted state ground independently and adequately supports the judgment; Abie State Bank v. Bryan, 282 US 765,75 Led 690 (1931).

Is the state ground substantially adequate?

In Ford v. Georgia, 498 US 411, 112 L Ed2d 935, 111 S Ct 850 (1991), this Court held that only a state practice that is "firmly established and regularly followed" at the time at which it is applied may be interposed to prevent subsequent review by this Court.

In Waite II, the Court of Appeals held that, under the law-of-the-case doctrine, trial court lacked jurisdiction to consider plaintiff's motion. However, in Waite II the issues and questions are different from the questions in Waite I.

It is an established rule of law in Nebraska that where the issues and questions are different between the first appeal and the second appeal, the "law of the case doctrine" does not apply; Nedela v. Mares Auto Co., 110 Neb. 108, 193 N.W. 345 (1923);

In re Wecker's Estate, 123 Neb. 504, 243 N.W. 642 (1932); System Meat Co. v. Stewart, 190 Neb. 682, 211 N.W.2d 902 (1973); Tank v. Peterson, 228 Neb. 491, 423 N.W.2d 752 (1988); Security State Bank v. Gugelman, 230 Neb. 842, 434 N.W.2d 290 (1989); and Wicker v. Vogel, 246 Neb. 601, 521 N.W.2d 907 (1994). I find no cases in Nebraska which change this rule of law.

The Court of Appeals did not strictly and regularly follow this state procedural rule in Waite II. In Waite II, the issue is whether the former judgment is void and whether the trial court violated the petitioner's rights under the 14th amendment to the U.S. Constitution; whereas in Waite I, the issue was only whether or not there was any genuine issue as to any material fact as to whether the personal representative's pleadings were a nullity.

Is the state ground independent?

The U.S. Supreme Court may review the decision of the highest court of a State, which affirms or denies the validity of the judgment of an inferior court over which it has authority if such decision involves a federal question; Williams v. Bruffy, 102 U.S. 135 (12 Otto 248) (1880). If the state ground is so interwoven with the federal ground as not to be an independent matter or is not of sufficient breath to sustain the judgment without any decision on the federal ground or is a mere device to prevent a review of the decision upon the federal question, and if a federal right or immunity was specially set up and claimed which, if recognized and enforced, would require a different judgment, the Supreme Court's jurisdiction is plain; Chicago B. & Q Ry. Co. v. Illinois, 200 US 561, 50 L Ed 596, 26 S Ct 341 (1906).

If Waite I is constitutionally invalid

because the trial court and court of appeals violated Petitioner's 14th amendment rights, then it would require a different judgment in Waite II because the "law-of-the-case" doctrine like res judicata does not apply where the former judgment is constitutionally invalid or not final; United States v. United States Smelting, R. & M. Co., 339 U S 186, 94 L Ed 750 (1949).

Furthermore, cases 38269, 38270, and 38279 assigned to Judge Robert O. Hippe in the Scotts Bluff District are still pending and the federal case against Judge Robert O. Hippe and Attorney James A. Snowden is still pending on appeal (App. of Pet. 87-88).

It is clear that the Judgment in Waite v. Carpenter, et. al., 3 Neb. App. 879, 533 N.W.2d 917 (1992) does not rest on adequate and independent substantive state grounds.

CONCLUSION

Petitioner, Glenn R. Waite, prays that this Court will grant his petition for writ of certiorari to the Nebraska Court of Appeals because (1) Petitioner set up and claimed a title, right, privilege or immunity under the U.S. Constitution, (2) the Nebraska Court of Appeals decided the federal claims against the petitioner, and (3) the decision of the Nebraska Court of Appeals does not rest on independent and adequate substantive state grounds. This Court has jurisdiction under 28 U.S.C. 1257.

Respectively Submitted,

Glenn R. Waite
Petitioner
1202 West 28th St.
Cheyenne, WY 82001
307-634-8712

REPLY BRIEF APPENDIX

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APPENDIX

IN THE DISTRICT COURT OF SCOTTS BLUFF COUNTY, NEBRASKA

GLENN R. WAITE, Plaintiff, vs. W. SCOTT CARPENTER, M.D., REGIONAL WEST MEDICAL CENTER, SCOTTSBLUFF INTERNAL MEDICINE GROUP, Defendants.	)	NO. 38267 **NOTICE OF APPEAL**

TO: W. SCOTT CARPENTER, M.D.; REGIONAL WEST MEDICAL CENTER; AND SCOTTSBLUFF INTERNAL MEDICINE GROUP AND THEIR ATTORNEYS OF RECORD: Mark E. Novotny, 10306 Regency Parkway Dr., Omaha, NE 68114; & James A. Snowden, 1000 NBC Center, Lincoln, NE 68508;

Plaintiff, Glenn R. Waite, individually, as the sole distributee and sole beneficiary of the estate of Harriet I. Waite hereby notifies you that he intends to prosecute an appeal to the COURT OF APPEALS / SUPREME COURT for the State of Nebraska from the decision of the honorable Judge Alfred J. Kortum on April 18, 1994 in which he overruled the Plaintiff's Motion for New Trial which was heard by Judge Kortum in chambers.

Dated this the 2nd day of May 1994.

GLENN R. WAITE
Plaintiff
1202 West 28th St.
Cheyenne, WY 82001
307-634-8712

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a true and correct copy of the foregoing Notice of Appeal to be served upon Mark E. Novotny, 10306 Regency Parkway Dr., Omaha, NE 68114; and James A. Snowden, 1000 NBC Center, Lincoln, NE 68508 by regular U. S. Mail this the 2d day of May 1994.

Glenn R. Waite

IN THE COUNTY COURT OF SHERIDAN COUNTY, NEBRASKA

IN THE MATTER OF THE ESTATE OF HARRIET I. WAITE, Deceased	)))	NO. PR90-78 **DISTRIBUTION OF ESTATE ASSETS**

COMES NOW, Glenn R. Waite, Personal Representative of the above decedent, and hereby, pursuant to section 30-24,105 of the Neb. Rev. Stat. (Reissue 1989), assigns, tranfers and releases all interests in the following estate asset:

the chose in action involving a claim for negligence in the care and treatment of the Decedent, Harriet I. Waite,

to himself, Glenn R. Waite, individually, who is the sole heir at law under intestate succession and the sole beneficiary of the decedent's estate.

Glenn R. Waite, Personal Representative of the above decedent, being first duly sworn on oath, deposes and states the following based on personal knowledge:

Harriet I. Waite died intestate on April 17, 1989 and her only surviving spouse was Peter A. Waite, and her only surviving issue were Beverly E. Sipple, natural daughter; Doris R. Butler, natural daughter; and Glenn R. Waite, natural son. Peter A. Waite, Beverly E. Sipple, Doris R. Butler, and Glenn R. Waite are the sole and only heirs at law of the above decedent. There are no other natural or legal heirs.

All heirs, excepting Glenn R. Waite, have filed with the clerk of this court a written instrument of Renunciation of Succession, Affidavit, and Assignment. This leaves Glenn R. Waite to be the sole surviving heir at law under intestate succession.

_____
Glenn R. Waite
Personal Representative
1202 West 28th St.
Cheyenne, WY 82001

STATE OF WYOMING) ss.
COUNTY OF LARAMIE)

ACKNOWLEDGMENT:

Before me personally appeared Glenn R. Waite and he acknowledged the above document and signed the execution of the above in my presence.

_____
Notary Public

Dated this the 29th day of November 1993.

IN THE COUNTY COURT OF SHERIDAN COUNTY, NEBRASKA

IN THE MATTER OF THE ESTATE OF HARRIET I. WAITE, Deceased	)))	NO. PR90-78 **DISTRIBUTION OF ESTATE ASSETS**

COMES NOW, Glenn R. Waite, Personal Representative of the above decedent, and hereby, pursuant to section 30-24,105 of the Neb. Rev. Stat. (Reissue 1989), assigns, tranfers and releases all interests in the following estate assets:

Any and all property, real or personal, wherever stituated; any and all causes of action, and any other estate assets, wherever situated,

to himself, Glenn R. Waite, individually, who is the sole heir at law under intestate succession and the sole beneficiary of the decedent's estate.

Glenn R. Waite, Personal Representative of the above decedent, being first duly sworn on oath, deposes and states the following based on personal knowledge:

Harriet I. Waite died intestate on April 17, 1989 and her only surviving spouse was Peter A. Waite, and her only surviving issue were Beverly E. Sipple, natural daughter; Doris R. Butler, natural daughter; and Glenn R. Waite, natural son. Peter A. Waite, Beverly E. Sipple, Doris R. Butler, and Glenn R. Waite are the sole and only heirs at law of the above decedent. There are no other natural or legal heirs or interested persons in the estate. The decedent had no debts when she died and there have never been any claims filed against the personal representative.

All heirs, excepting Glenn R. Waite, have filed with the clerk of this court a written instrument of Renunciation of Succession, Affidavit, and Assignment. This leaves Glenn R. Waite to be the sole surviving heir at law under intestate succession and sole distributee.

_____
Glenn R. Waite
Personal Representative
1202 West 28th St.
Cheyenne, WY 82001

STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

ACKNOWLEDGMENT:

Before me personally appeared Glenn R. Waite and he acknowledged the above document and signed the execution of the above in my presence.

_____
Notary Public

Dated this the 1st day of November 1995.